

No. 14795

United States
Court of Appeals
for the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation, Appellant,
vs.
ERNEST EVERETT, Appellee.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 283 to 549, inclusive)

Appeal from the United States District Court for the Eastern
District of Washington, Northern Division

FILED

DEC - 1 1955

PAUL P. O'BRIEN, CLERK

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(Testimony of John J. O'Neill.)

Q. Directing your recollection, Mr. O'Neill to the 8th of March, 1952, where were you the afternoon of that day?

A. Well, I was over home—I always call it home—my brother's place there.

Mr. McKevitt: Pardon me, would your Honor caution Mr. O'Neill about the acoustics? I just can't hear.

A. I was over at my brother's home and was helping him build a corral.

Q. (By Mr. Connelly): Over at Leo O'Neill's place we were just speaking about on that map?

A. That's right.

Q. Who all was there with you?

A. Well, my two boys and my brother Leo, Larry.

Q. Mick and Larry?

A. Larry and Leo.

Q. And that square, which is roughly on the south side of the road, represents the house, does it?

A. That's right.

Q. And are there outbuildings adjacent to it or on the other side of the road? [320]

A. Well, there is barns and corral is on the other side of the road.

Q. North?

A. It would be west from the house.

Q. West from the house?

A. Yes, it would be northwest of the house.

Q. Where were you fellows working?

A. Right over—well, across the road from the

(Testimony of John J. O'Neill.)

house over by the barn. That would be down, oh, I probably have to point it out to you.

Q. Why don't you come down, if you will, and put an "X" up on that paper and you can show us where you were working?

(Witness goes to Exhibit 1.)

A. Just approximately it would be—well, this is your railroad crossing, well, we were practically in line with it. The corral would be in here (indicating), they adjoin, this road is 60 feet, and then they have 100 feet right of way. Well, the corral of where the poles was where we was working was—one fence is right along the road here and we was right in here.

Q. That is a scale of one inch on the map is 20 feet on the ground. Without measuring it off, just give us an idea of where you were, where you fellows were standing. [321]

A. Well, we were probably——

Q. Make an "X" on the map.

A. I don't know, I just guess at along in here (indicating).

Q. Put your initials next to that.

A. (Witness complies.)

Q. All right, that is fine, thank you.

A. Maybe off a little way one way or the other.

Q. Well, give us a general idea and that is close enough, I think. That is about where you and Leo and the two boys were working on the corral?

A. Right at that time, when we had the poles

(Testimony of John J. O'Neill.)

there, and then we would carry them over to the corral there, right up in that vicinity.

Q. Do you recall about the time of day?

A. Well, it was in the afternoon. We had been there all afternoon.

Q. Do you recall the weather and the atmospheric conditions, the visibility, and so on? How about that?

A. It was a nice, clear day.

Q. Now, did something out of the ordinary occur as you and the other fellows were standing there working?

Q. Well, this accident happened there.

Q. Will you tell us what it was that first gave you notice that something out of the ordinary was happening? [322]

A. Well, I don't know what really caused it, we just heard the train and looked up and there was a car on the crossing and the train coming.

Q. All right, before we go on, you say "We heard the train." Did you hear a train tooting its whistle, or did you hear the rumble of a train?

A. Well, I heard the rumble of the train and then I looked up and there they were both there, the train and the car on the track, too.

Q. Did you at any time hear it tooting or the train whistling? A. Yes.

Q. And was this tooting that you heard after you heard the rumble and looked up?

A. That's right.

(Testimony of John J. O'Neill.)

Q. Where was the train when you first heard the rumble and looked up and saw it?

A. Just coming under the underpass.

Q. Just coming under this Milwaukee underpass that is indicated on the map? A. That's right.

Q. The concrete abutment business?

A. That's right.

Q. And where was the train when you first heard a whistle being blown? [323]

A. About midway, I would say or close, between there and the crossing.

Q. About midway?

A. Well, or approximately, I wouldn't say exactly.

Q. Well, giving us an idea, I will move the pencil along here, I think you can see that.

A. Yes.

Q. Here is the overpass of the Milwaukee, here is the O'Neill crossing, and you tell me about where the train was when you first heard the tooting.

A. Oh, well, about as long as—well, the engine and a car, I imagine, was about—the engine was all, it would be along in there (indicating).

Q. Right along in there?

A. Some place.

Q. All right, if I put an "X" on that, that is pretty close to where——

Mr. McKevitt: That map is drawn to scale, Mr. Connelly. I don't want an "X" to actually represent anything on this map, if your Honor pleases.

Mr. Connelly: I believe it is the best estimate, your Honor; that this fellow would have a right to

(Testimony of John J. O'Neill.)

come down and estimate on the map, scale or no scale.

The Court: I think the record may show on what basis it is put—will show, I mean. [324]

Mr. McKevitt: Well, the mark that is on the map isn't his testimony as to actual distance.

Mr. Connelly: It is an estimate, as I understand his testimony.

The Witness: I wouldn't say that exact.

Mr. Connelly: No.

The Witness: Where I marked for where we was standing isn't exact, it is in the vicinity, right close.

The Court: It is your best recollection?

A. That's right.

Mr. Connelly: Pardon me, your Honor.

The Court: He says it is his best recollection as to approximately where it was.

Mr. Connelly: I have labeled that "J. J. O'Neill" and I will mark it "Train" as your estimate as to where it was when you first heard the tooting of the whistle.

A. There was three toots along in there.

Q. Living where you do live and having lived where you have lived in the O'Neill house, I suppose I am correct in assuming that you heard the train go by there and heard it whistle probably hundreds of times? A. That's right.

Q. Now, when you first heard this train blowing its whistle about the place where the mark is on the map, was it an ordinary run-of-the-mill blowing

(Testimony of John J. O'Neill.)

of the whistle [325] or was it an extraordinary or frantic blowing of the whistle?

A. Well, it was just them three short toots.

Q. Three short toots? A. Yes. Sharp.

Q. When you first saw the train, and as I understand it, that was as it was just emerging from the Milwaukee underpass? A. That's right.

Q. Did your vision take in the approaching automobile driven by the Everett girl at the same time?

A. Well, when we—the way we was standing there, we just looked and seen the train and the car both.

Q. Now, was the car on the crossing at that time? A. That's right, yes.

Q. Did you see the girl at the time you saw the car? A. She was in it.

Q. She was inside the car at that time?

A. Yes.

Q. Could you tell what she was doing in the car at that time?

Q. Well, no, you couldn't tell what she was doing. You might imagine she was stalled or something, that it was stopped there.

Q. The car was completely stopped and stalled when you [326] first saw it? A. That's right.

Q. What happened then after you took this in with your eyes and saw this?

A. Well, she got out, shut the door, and just hesitated there, and then she took off.

Q. About how far was the train from her when she got out of the car and shut the door and——

(Testimony of John J. O'Neill.)

A. Well, that was happening so quick, I couldn't say. It was——

Q. When she had took off, in what manner did she take off?

A. Well, it would the car on the track and then she headed off—it would be a north, northern direction, northeast.

Q. North away from—— A. Yes.

Q. Away from the track toward the highway?

A. That's right.

Q. Was she running at that time?

A. Well, she was getting out of the way, she had time to take about three, four steps. That is the last I could see of what happened there. I figured she was about 10 feet from the car.

Q. You figure she was 10 feet from the car when the train [327 struck, is that it?

A. Huh?

Q. She was 10 feet from the car when the car was hit by the train?

A. Well, approximately that. She was running and you could see the space between her and the car.

Q. Did you think she had escaped when you saw all this? A. I thought she would make it.

Q. What did you do then after you saw the collision? A. Well, we run over there.

Q. All four of you fellows?

A. No, my brother Leo, and Larry started to come over and Leo told Larry to go to the house and call an ambulance, and Leo and I went over.

(Testimony of John J. O'Neill.)

Q. Did you see the girl laying on the road bed as you started over?

A. No, I didn't, not until I was over on the track when I first seen her or found her.

Q. Did you and your brother Leo go over and the boys went back to the house, is that it?

A. They went to the house.

Q. Larry and the younger brother?

A. Larry. I don't know whether Mick went to the house or not, but he never come over.

Q. Where did the train finally stop? [328]

A. Up the track.

Q. How far up the track, about?

A. Oh, I would say the back end of the train was, oh, 4 or 500 feet from the crossing.

Q. 4 or 500 feet?

A. Approximately that. I never went up to the train, but it was approximately that far.

Q. Do you recall how many cars, not counting engine pulling units, that made up the train?

A. No.

Q. Your figure of 4 or 500 feet—I think your figure is 4 or 500 feet as about the distance from the crossing to the back end of the train down the track? A. That's right.

Q. About how long would you say the train was?

A. Well, I would say the distance between the back of the train and the crossing was, oh, approximately, when we got over and then looking back at

(Testimony of John J. O'Neill.)

it, it would be about the distance, the same distance as the train, the length of the train.

Q. I see. A. The back end.

Q. How far down the right of way from the crossing toward the west was the girl's body?

A. Oh, I would say around 45, 50 feet. I never stepped it [329] off.

Q. No, don't misunderstand me, I'm not expecting you to give it directly to the foot. It is just as we all see these things and approximate, is all, Mr. O'Neill.

A. I would say between 40 and 50 feet.

Q. Something like 40 or 50 feet?

A. Then off——

Q. Pardon me?

A. Then she was laying off the side about 10 feet from the track.

Q. Was the car still plastered around the front end of the train, the engine?

A. That's right.

Q. Did you talk to the engineer at the scene of the accident?

A. There was two railroad men come down and I don't know whether they were engineers or who they were, but I showed them where the girl was and they thought it was on the other side, but I think they had seen my brother was over there looking for the girl. That is probably who they had seen.

Q. Do you recall Mr. Scobee being there then?

A. No, I don't.

(Testimony of John J. O'Neill.)

Q. He was the engineer of the train.

A. Well, I don't know, I wouldn't recognize him at all who [330] they was. They were in their work clothes there and I wouldn't—I didn't pay enough attention to them.

Q. And that is about what you saw concerning this accident? A. Yes.

Q. Have you ever seen a railroad engine or a railroad train dynamite its brakes?

A. Oh, I did one time there.

Q. And would you say from what happened on that occasion that you are telling us about——

A. Well——

Mr. McKevitt: Just a moment. I object to the form of that question. I don't think he has finished the question, the witness started to answer something.

The Court: Well, I thought he had finished the question. Will you read it, please?

(The question was read.)

Mr. McKevitt: Is he asking it——

Mr. Connelly: Is there an answer?

The Reporter: I have no answer.

Q. (By Mr. Connelly): Would you tell us what happened, what did you see, when you saw that railroad train dynamite its brakes that time you just mentioned?

A. Well, that tore up all the track and threw cars off.

Q. Did sparks fly from the bottom of the wheels?

(Testimony of John J. O'Neill.)

A. Well, I wouldn't say there was sparks flying, but she really tore up things.

Q. Have you ever seen that type of situation happen the second time or another time?

A. No.

Q. Have you seen trains make ordinary stops, stops which were not emergencies, stops which did not involve the dynamiting of the brakes?

A. Oh, yes.

Q. Pardon me just a moment, Mr. O'Neill.

Going back now to when you first saw the train coming out from under the Milwaukee viaduct, did you notice any slackening of the speed of the train at that time? A. No.

Q. Did you at any time before the collision and after you saw the train coming out from under the viaduct notice a slackening of the speed of the train? A. Well, no, I didn't.

Q. Is it your testimony that the train seemed to maintain the same speed?

Mr. McKevitt: That is leading and suggestive. Objected to on that ground.

The Court: Yes, I think it is leading.

Q. (By Mr. Connelly): Did the train maintain the same speed [332] from the time you saw it coming out from under the viaduct until it reached O'Neill crossing?

A. I couldn't say that.

Q. Can you estimate the speed of the train when you first saw it coming out from under the viaduct?

(Testimony of John J. O'Neill.)

A. Oh, between 55 and 60 miles an hour, I imagine.

Q. And I understand your testimony to be that you noticed no slackening of the speed?

A. Well, not enough to notice it much, I couldn't say for sure.

Q. Would you say that the train at any time between the time it emerged from under the underpass up until the time it crossed the crossing and hit the panel car dynamited its brakes?

Mr. McKevitt: Object to that, unless it is shown that the witness knows what dynamiting brakes is.

The Court: I will sustain the objection to that. He can tell how it appeared and how it behaved, and the jury can draw the conclusion.

Q. (By Mr. Connelly): Well, let's put it this way, then, Mr. O'Neill: From the time you saw the train coming out from the underpass until it reached O'Neill crossing, was there any noticeable slackening of its speed?

Mr. McKevitt: Well, I object to the form of that question. [333]

The Court: He may answer that.

A. Well, it is hard to say. You know, it is such a short distance there and you are watching both, you can't——

Q. (By Mr. Connelly): Well, the standard that I used was "noticeable." Either you did notice a slackening or you didn't. A. Well——

Q. On that basis and with that explanation of

(Testimony of John J. O'Neill.)

the meaning that I put on "noticeable," what would your answer be? A. You wouldn't.

Q. You wouldn't? A. You wouldn't, no.

Q. You didn't?

A. No, I don't think so.

Mr. Connelly: I believe that is all.

Mr. McKevitt: Does your Honor——

The Court: I think we may as well suspend, then. Adjourn now until 10 o'clock tomorrow morning.

(Whereupon, the trial in the instant cause was adjourned until 10 o'clock a.m., Wednesday, January 19, 1955.) [334]

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to-wit:)

The Court: Mr. O'Neill was on the stand, I believe, Mr. John J. O'Neill. Had you finished your direct examination, Mr. Connelly?

Mr. Connelly: Yes, your Honor.

The Court: All right, you may proceed with cross-examination, Mr. McKevitt.

JOHN J. O'NEILL

having previously been duly sworn, resumed the stand and testified further as follows:

(Testimony of John J. O'Neill.)

Cross Examination

Q. (By Mr. McKevitt): Mr. O'Neill, how long have you lived in that area where this accident occurred? A. 45 years.

Q. 45 years. And about how far from the crossing is your home? A. Oh—— [335]

Q. Approximately, is all?

A. Oh, approximately a thousand feet.

Q. A thousand feet? A. Yes.

Q. That house there is your brother's house, is that correct? A. My mother's.

Q. Oh, your mother's. I believe you were asked yesterday if you had seen a train operating over there which appeared to you to have been dynamited. How long ago was that?

A. Oh, that was about—probably 35 years ago.

Q. A freight train?

A. Freight train, yes.

Q. Steam locomotive? A. Yes.

Q. If I recall your testimony correctly, your attention was attracted to the approach of this train by a combination of the rumble of the train and certain whistles, certain whistle signals; is that correct?

A. Well, the rumble is first and then the whistle.

Q. Now, were those whistles long blasts, or how many blasts of the whistle did you hear?

A. Three.

Q. Huh? [336] A. Three.

Q. And were they long blasts or——

A. Just (indicating).

(Testimony of John J. O'Neill.)

Q. ———sharp? A. Short, sharp blasts.

Q. And do you know how far the train was from the crossing—it would be the front end of it—when you heard those whistle blasts?

A. I would say about midway between the viaduct and the crossing.

Q. I see. You did not see the car, the truck, approach the crossing? A. No.

Q. And you don't know how long it was on the crossing before it was hit, do you? A. No.

Q. Which did you see first, the train or the truck, or was it just about simultaneous?

A. Just——

Q. What was your answer?

A. Well, just about the same time.

Q. About the same time. The speed of the train, am I correct that your testimony was 55 to 60?

A. That's right.

Q. That is just an estimate, isn't it? [337]

A. That is just an estimate.

Q. And probably it might have been 65; is that correct?

A. I wouldn't know, I just figured between 55 and 60, along there.

Q. You didn't have much opportunity to observe it, did you? A. No, that's right.

Q. To your knowledge, having living in that vicinity, that passenger train, prior to March, 1952, had been operating over that crossing about that time of day for a great many years, hadn't it?

A. Yes.

(Testimony of John J. O'Neill.)

Q. And there are a great many trains, freight and passenger, that cross that crossing day and night; isn't that true? A. Yes.

Q. Your answer is "yes"? A. Yes.

Q. With reference to where Erna's body came to rest, you fixed some distance. What was that?

A. Oh, I would say around 40, between 40 and 50 feet. I never stepped it off.

Q. I know, that is your estimate.

Q. And it is agreed, I think, that her body, with reference to the track, was on, we will call it, the O'Neill side [338] of the track?

A. Yes.

Q. Is that right. And how far from the rails, do you know?

A. Well, there is rails and then there is a short incline and—well, you would say over the shoulder, she was just over the shoulder.

Q. The shoulder of the what, the highway?

A. No.

Q. The shoulder of the road bed?

A. The road bed.

Q. I see, of the railroad bed. You estimate that the rear end of the train was how far from the crossing, did you say?

A. Oh, about 600 feet or approximately the length of the train.

Q. I see. That is from what you base your estimate, of the length of the train as compared with the distance from the rear end to the crossing?

A. That's right.

(Testimony of John J. O'Neill.)

Q. Did you notice any police officers or state highway patrolmen down there?

A. Yes, there was a patrol officer was there. I didn't talk to him there.

Q. Did you notice Mr. Everett down there that day? Mr. Everett? [339]

A. I don't remember now whether he was there while I was still there or not.

Q. I see. Now, as to the actions of the girl herself, do I understand your testimony to be that you saw her open the door of the car, of the truck?

A. Yes.

Q. Step out of the truck? A. Yes.

Q. Close the door of the truck? A. Yes.

Q. And then take a certain number of steps in a certain direction. How many steps did she take?

A. Oh, I would say—well, she got, I figured she was about 10 feet from the——

Q. From the what?

A. From the truck.

Q. And where was she standing at that 10 foot distance, in the track or on the side?

A. Well, from where we was standing, you couldn't see the rails or whether she was over the side of it or not.

Q. You mean whether she was between the rails or outside of one rail, you don't know?

A. That I don't know.

Mr. McKevitt: I think that is all.

The Court: And other questions? [340]

Mr. Connelly: I think that is all.

(Testimony of John J. O'Neill.)

The Court: All right, Mr. O'Neill, you may step down.

(Witness excused.)

Mr. Connelly: Call Larry O'Neill, please.

LAWRENCE SHAW O'NEILL,

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Connelly): Will you give us your full name, please?

A. Lawrence Shaw O'Neill.

Q. Keep your voice up so we can all hear, and most particularly the members of the jury, if you will, please.

Where do you live, Larry?

A. Ellensburg, Washington.

Q. And what is your dad's name?

A. John J. O'Neill.

Q. He is the man who just finished testifying here, of course? A. Yes, sir.

Q. Do you work or do you go to school at the present time?

A. Well, I am going to school now and taking a series of tests for entrance to West Point. [341]

Q. You plan to go to West Point?

A. Yes.

Q. And you have taken certain examinations for that, have you? A. Yes, sir.

(Testimony of Lawrence Shaw O'Neill.)

Q. When do you plan on finishing your high school work? A. June of this year.

Q. You are a senior, then, this year?

A. Yes.

Q. Do you have any brothers?

A. I have two brothers.

Q. Any sisters? A. And one sister.

Q. Have you lived in Ellensburg all of your life? A. Yes, I have.

Q. And you live with your dad, of course, at the place where he told us that he lives?

A. Yes.

Q. That is about, as I understand it, a thousand feet from this crossing, or a thousand yards from this crossing that we are speaking of?

A. Well, no, I don't live there. That is where my grandmother lives.

Q. Oh, your dad was speaking of the home place or his mother's place when he gave where he did live? [342]

A. Where he did live, yes.

Q. Where do you folks live now?

A. It is about four miles away from that place.

Q. Down the O'Neill Road further.

A. Well, it is in a, oh, a westerly direction.

Q. I see. A. From there.

Q. Directing your attention back to the 8th of March, 1952, Larry, which of course is the day that this accident occurred, and particularly the afternoon of that day, where were you?

A. I was at this place, my uncle's place, and

(Testimony of Lawrence Shaw O'Neill.)

we were building a corral across the highway from it.

Q. And who all was there with you?

A. My dad and my uncle and my younger brother.

Q. Have you had a chance to take a look at this map and orient yourself with it?

A. Yes, I have.

Q. And you are, then, familiar with what this is supposed to depict? A. Yes.

Q. And the directions, and so on, with reference to it, north being generally toward the top of the map, south, of course, the bottom, east to the right, and west to the left? [343] A. Yes.

Q. I will turn this around a little bit. And do you recognize this (indicating) as being your grandmother's home place, the O'Neill place?

A. Yes.

Q. And do you recognize this as the O'Neill crossing? A. Yes.

Q. This particular day, about where were you and your father and your uncle and your brother working?

A. Would you like me to point it out?

Q. Yes, I think if you would come down, so as to get this squared away all around.

(Witness goes to map.)

Here is a pencil if you would like to mark it.

Mr. Etter: Larry, will you stand off to the side so the jury can see you mark it?

(Witness places mark on Exhibit 1.)

Q. (By Mr. Connelly): That is about the vi-

(Testimony of Lawrence Shaw O'Neill.)

cinity that you and the other men were putting up the corral, is it? A. As I remember it.

Mr. McKevitt: Will you mark that "L.O."?

The Court: Yes, I think if you will put his initials to distinguish it from the others.

(The initials "L.O." were placed next to the mark made by the witness by Mr. Connelly.)

Q. (By Mr. Connelly): Now, on this particular day, and while you are still standing here next to this map, did something occur which drew your attention to the railroad track itself?

A. Yes, the whistle of the train was my first——

Q. The first thing that you heard was the whistle of a train? A. Yes.

Q. And what did you do then when you heard the whistle of the train?

A. Well, I started watching it, of course.

Q. Did you turn and start to watch it?

A. I just turned my head like this (indicating), and we had poles, a couple of poles over our shoulders, see, we were faced away from it, and I just looked like that.

Q. Is it a practice of yours to turn and watch a train when you hear it?

A. Yes, I never see enough of them.

Q. You always watch a train when it goes by?

A. Yes.

Q. Well, where was this train then when you first heard the whistle and turned your eyes and saw it?

A. Oh, when I first glanced at it, it was just coming under the underpass.

(Testimony of Lawrence Shaw O'Neill.)

Q. Just coming under the underpass? [345]

A. Yes.

Q. Had any part of it emerged from the underpass toward the west?

A. Yes, the—oh, anywhere from the large part of the engine back a car. The engine and a car.

Q. About an engine and a car? A. Yes.

Q. Would you make, if you could, an "X" or a line on the map and initial it as to about where the front of the engine was when you first heard the whistle and saw it? That map is, of course, scaled, if that is any help to you, one inch being 20 feet.

(The witness placed a mark on Exhibit 1 and initialed it.)

Q. All right, I think it might be better if you returned to the chair, Lawrence.

(Witness resumes stand.)

Now prior to that time, had you heard any sound at all of a train whistle?

A. I hadn't noticed any.

Q. You hadn't noticed any. As you turned your eyes and glanced up here toward the direction of the tracks, did you see anything with reference to the crossing? A. No, I didn't.

Q. The O'Neill crossing? [346] A. No.

Q. Did you notice an automobile on the crossing? A. No.

Q. Did you at any time after first noticing the train look back and examine the crossing?

A. As he was coming farther on down the track, I did, yes.

(Testimony of Lawrence Shaw O'Neill.)

Q. And what did you see then when you looked at the crossing?

A. Well, the truck was stalled there on the—or was sitting there on the tracks.

Q. What kind of a whistle was it that you heard when you first heard it? A. Two long blasts.

Q. Two long blasts. And by a long blast, in seconds, could you estimate it? A. Well——

Q. Pretty hard to do, but if you can. If you can't, that is all right, too.

A. Well, I have heard the estimates here in the court and I think that would be just about right.

Mr. McKevitt: A little louder, please?

A. The two seconds for each blast and about the same in between.

Q. (By Mr. Connelly): That is your estimate of it, about two seconds a blast? [347]

A. Yes.

Q. And you say you heard two of these?

A. Yes.

Q. And was it after that that you glanced down toward the crossing?

A. No, it was when he got about halfway between the trestle and the crossing, well, he whistled three real sharp fast ones, and then was when I glanced at the crossing.

Q. Can you estimate the speed of the train as you saw it come out from under the underpass?

A. Well, I would say it was approximately 50 or 55 miles an hour.

(Testimony of Lawrence Shaw O'Neill.)

Q. Did you recognize the automobile when you saw it as belonging to someone that you may have known? A. No, I didn't.

Q. Did you see anyone in the automobile when you first looked at it? A. No.

Q. Tell us then what you saw, if you saw anything more, with reference to the car at the crossing as it lay there stalled in the middle of the tracks.

A. Well, I looked down there and I was looking at the car, and it was just a split second until she jumped out of [348] the car and she hesitated there for a moment and started running, and then after she had taken three or four steps, well, the impact occurred and the dust and everything, I couldn't see anything more.

Q. There was a huge crash, was there, and a lot of dust thrown up in the air?

A. Yes, there was.

Q. Well, then, to kind of put this thing together, when you first saw the automobile, then, as I understand your testimony, the train was roughly half-way between the underpass and the crossing?

A. Yes.

Q. Or about where your dad made this "X" mark. And at that moment, the girl was still in the automobile? A. Yes.

Q. Which door of the car did she come out of?

A. The left side.

Q. That would be the side——

A. The driver's side.

(Testimony of Lawrence Shaw O'Neill.)

Q. —most to the west. What exactly, if you can picture it again in your mind, did she do or did you see as the door of the car first came open? Try to recall every little thing, if you can, to add anything to what you have already told us.

A. Well, she just jumped out and paused there for that moment standing by the car. [349]

Q. Did she pause before or after she shut the door of the car?

A. I didn't even watch the door to see if it did close or not.

Q. You don't recall whether it was closed?

A. I don't know whether she did that.

Q. Could you tell which way she was looking as she paused there momentarily?

A. Well, as I see it now, she was standing facing kind of toward the front of the car, and I couldn't see her, it was quite a ways away, and I couldn't see what way her head was turned, I didn't notice it.

Q. Pardon me?

A. I didn't notice what way her head was turned.

Q. I see. Could you estimate in time the length that she paused there frozen by the door of the car?

A. Probably one or two seconds. It was a very short time.

Q. Then when she started to move, did you say she started to run? A. Yes.

Q. And which direction did she run?

(Testimony of Lawrence Shaw O'Neill.)

A. Well, almost parallel to the truck and a little bit more north, you know.

Q. Almost parallel—— [350]

A. Up the tracks.

Q. ——to the truck? A. Yes.

Q. To the truck or to the tracks?

A. To the truck.

Q. In other words, she started running in a westerly direction, angling to the north?

A. Yes, it was probably closer to due north, as it is on that map.

Q. Closer to this angle (indicating)?

A. Yes.

The Court: It is a little misleading. You mean she ran perpendicular to the track, at right angles of the track, straight up from the track?

What I have in mind is the true north there as indicated by that arrow is not straight up on the map. A. Yes.

The Court: All I am trying to do is to get just what your testimony is on that.

A. Well——

Q. (By Mr. Connelly): There is true north on the map, Larry (indicating). A. Yes.

Q. Did she run roughly——

A. That is approximately. [351]

Q. ——the same direction, about that direction, away from the car? A. Yes.

Q. Which would be about due north?

A. Yes.

(Testimony of Lawrence Shaw O'Neill.)

Q. But angling, of course, from the position of the automobile? A. Yes.

Q. How many steps would you say that she had taken before the train crashed into the automobile?

A. Oh, three or four, just got a good start.

Q. Three or four steps. And feet on the ground, about how many would you say she covered?

A. Well, I couldn't say that, because I couldn't judge the distance as she was running closer toward me, see.

Q. After this crash, then what did you do?

A. Well, I went over and told my aunt to call the Sheriff, and then I came back over to that barn there where we were working and I just stood there and watched.

Q. You came back over where you had been working and stood there? A. Yes.

Q. You didn't go over across the track with your Uncle Leo? A. Not then. [352]

Q. Did you later?

A. Oh, it was about two or three hours later I went over there.

Q. Two or three hours later when——

A. It was after everything was all cleared out.

Q. When the officers had all gone?

A. Uh-huh.

Q. Did you estimate the speed of the train as 50 to 55 as you saw it coming out——

A. As I saw it, yes.

Q. Did you notice the train slow down or speed up or do anything at all between the time you saw

(Testimony of Lawrence Shaw O'Neill.)

it come out of the underpass and the time it got to O'Neill crossing?

A. Well, I didn't notice anything spectacular about that.

Q. Specifically, did you notice the train slow down to any noticeable degree between those two points?

A. Well, I didn't watch the train very much after it hit that midpoint, but before that I didn't notice any reduction in speed.

Q. In other words, between here, where you first saw it, and about here, when you first noticed the automobile (indicating on exhibit) at the crossing and the train in this position, you did not notice any slowing?

A. That is the only place where I was watching it real closely, and I didn't notice any reduction in speed, no. [353]

Q. And you did not notice any reduction in speed? A. No.

Q. After the train hit the car and drove it down the track, did you notice where the train finally came to a stop?

A. Yes, I would estimate the front end of the train to be about 1,400 feet from the crossing.

Q. The front end of the train would be about 1,400 feet from O'Neill crossing. Did you have occasion to notice how many cars, exclusive of the engine, made up this train? A. No, I didn't.

Q. Do you have any recollection at all with reference to the length of the train so you could esti-

(Testimony of Lawrence Shaw O'Neill.)

mate, as you picture it in your own mind now, about how many cars there were in it? Were there two or three or eight or nine, or can you get a picture of it at all to estimate?

A. Oh, yes, it was just an average passenger train, possibly—well, six or eight cars in it.

Q. I see. Now, getting away from the collision for a minute, are you familiar with the crossing and the approach to the crossing from the south going toward your grandmother's place?

A. Yes, I am.

Q. Have you traveled over it a number of times? [354]

A. Oh, about 10 or 15 times, yes.

Q. And referring now particularly to times around the 8th of March of 1952, can you give us a description of the condition of the crossing at that time?

A. Well, I hadn't driven the road before that, I was only 13 years old, and I had no driver's license and I hadn't driven that much to be driving on that road.

Q. Had you ridden over it with your dad or with other people? A. Yes.

Q. Do you recall, as a passenger in the car, anything with reference to the condition of this crossing as you came to it from the south?

Mr. McKevitt: On March 8th, you mean?

Mr. Connelly: Yes, around the same date, March 8th of '52.

A. Well, the only thing that I would remember

(Testimony of Lawrence Shaw O'Neill.)

would be the incline of the road and that turn is on the incline.

Q. And what do you remember with reference to that?

A. Well, as you start up the hill, well, there is—you have to turn right while you are on that hill going up to the tracks from the south.

Q. And in your recollection, is there an appreciable incline there as you come up this last bit just around the turn? [355]

A. Yes, it is rather short.

Q. Do you have any recollection—and I refer to around the same time, March 8th of '52—of the condition of the right of way east of the crossing with reference to brush, undergrowth, foliage, et cetera? A. With relation to visibility?

Q. Yes?

A. No, I know there was brush there, but I don't know how it affected visibility.

Q. I see.

A. At all.

Mr. Connelly: Mr. Taylor, are all the exhibits here?

The Clerk: Yes, sir.

Q. (By Mr. Connelly): Well, excluding for the moment, then, the brush and undergrowth and foliage, as it may or may not have affected visibility as you recall it, what, if anything, can you tell us about the ability to see east up the right of way as you approached O'Neill crossing as it may be affected by the angle of the approach?

(Testimony of Lawrence Shaw O'Neill.)

A. Well, the angle of approach, you are approaching from the smaller angle and you have to look back over your shoulder when coming from the south to see the east right of way.

Q. In other words, you describe this as a rather acute angle (indicating). [356]

A. Yes.

Q. For an automobile as it comes up to a tangent onto the track?

A. Yes, until you get right up on that hill.

Q. I see. Larry, showing you Defendant's Exhibit No. 30, I will ask you to examine that, particularly with reference to—I guess it would be Photograph 1 there and 2, and ask you if that depicts fairly, as you recall it, the condition of the crossing with reference to the absence of ballast or dirt?

A. Yes, it does.

Q. To the planks? A. It does.

Q. That is just about the way it was?

A. Uh-huh.

The Court: What is that number, Mr. Connelly?

Mr. Connelly: That is No. 30, your Honor, the panoramic photo.

The Court: Oh.

Q. (By Mr. Connelly): Well, with that picture in mind, Larry, as you would ride over this crossing, would there be any difference between the east end of this crossing and the west end of the crossing?

A. Well, since I have been driving on that road,

(Testimony of Lawrence Shaw O'Neill.)

I have [357] always gone to the left-hand side of the road to go across that thing.

Q. What is the reason for that?

A. Well, it is just like on that picture, there is a big hump there, there is a hump there on that one side of it, and on the other side there isn't. I don't know, just take the easiest way.

Q. Did you have occasion to talk with anyone at the scene, other than your dad and your brother, of course?

A. No, I didn't.

Q. Did you know Erna Mae?

A. No, I didn't.

Mr. Connelly: I believe that is all. You may examine, Mr. McKevitt.

Cross-Examination

Q. (By Mr. McKevitt): You are past 16 now, are you, Larry?

A. Yes.

Q. When will you be 17?

A. The 15th of June.

Q. And you have just recently taken examinations for entry into West Point?

A. Yes.

Q. What subjects were you examined on, mathematics or what kind? [358]

A. Well, all of high school mathematics and——

Q. Calculus?

A. Yes—no, no calculus in the test.

Q. I see. You don't know whether you passed or not, do you?

A. No.

Q. I don't doubt you did. Now, with reference

(Testimony of Lawrence Shaw O'Neill.)

to the whistle signals, you did hear two long blasts of that whistle on that train that day?

A. Yes.

Q. And you space those two long blasts in some manner. What would be the length in seconds of time of each blast of the whistle?

A. Approximately two seconds for the blast and two seconds space.

Q. Two seconds of blast, two seconds space. And then later you heard three real sharp blasts?

A. That's right.

Q. Is that correct? And do I understand that when you heard the first long blast of the whistle, that the front of the Diesel was—was it under the underpass or overpass, was it under the overpass, the front end of the locomotive?

A. Well, I was looking toward the front end.

Q. Yes.

A. And it could have been either part of the Diesel or clear back to maybe a car when I first looked, when I first saw the train.

Q. Is it possible from the angle that you looked at it that when you heard the first long blast of the whistle, that the Diesel had not yet got under any portion of the overpass? That is possible, isn't it?

A. No, I don't think so, I could tell it that near.

Q. All right. And can you tell us how far the front end of the train was from the crossing when you heard the first of these three sharp blasts?

(Testimony of Lawrence Shaw O'Neill.)

A. About midway between the trestle and the crossing.

Q. Midway between the trestle and the crossing. You heard your father's testimony about the girl closing the door of the car after she got out of it?

A. Yes.

Q. Whether that happened or not, you don't know? A. That's right.

Q. And when she took these three or four steps, was she running or walking? A. Running.

Q. And you estimate that she had traveled how many feet before she was struck?

A. I couldn't estimate that because she was running toward [360] me, pretty close to toward me. I wouldn't estimate that.

Q. Had she taken these three or four steps before the Diesel hit the truck? A. Yes.

Q. She had taken three or four steps before the Diesel hit the truck. And from what you observed there, she took a direction at least partially to the west, didn't she, toward Seattle, we'll say?

A. Yes.

Q. She was running away from the train in some direction? A. Yes.

Q. And if I understood your answer to Mr. Connelly's question properly, insofar as you could say, having in mind this is true north the way my pencil is (indicating), she gets out of the truck here—— A. Down at the crossing.

Q. Or down at the crossing, rather—I had the

(Testimony of Lawrence Shaw O'Neill.)

wrong road here—and then her course would be somewhat like that (indicating); is that true?

A. Yes.

Q. From what you observed there, isn't it a fact that if she had taken just two or three steps to her left, she would have been clear of the track and wouldn't have been struck? [361]

A. Right.

Q. Isn't that correct?

A. Right.

Q. You know what I mean, if she had taken two or three steps toward the other rail, the rail on the opposite side, she would have been in the clear, wouldn't she?

A. She would have been in the clear. I think she was clear of the tracks, though, the other way, too.

Q. Yes.

A. But she would have been that much better off if she had went the other way, right.

Q. In other words, her body was thrown to the north, wasn't it, and to the west?

A. Yes.

Q. Now, prior to March 8, 1952, Larry, it is your testimony, as I understand it, that you had been over this crossing 10 or 15 times; is that correct?

A. No, he asked me how many times I had driven over it.

Q. Well, you—

A. That was 10 or 15 times, but I hadn't driven over it before then.

Q. Well, that is because you didn't have a license to drive?

A. Yes.

Q. But since you have had a license, have you

(Testimony of Lawrence Shaw O'Neill.)

driven over the crossing? [362] A. Yes.

Q. How many times was that?

A. Oh, possibly 10 or 15 times.

Q. And how long ago was that?

A. Well, it is—well, I don't think I ever drove over it before I got my license, but after that it has been about 10 or 15 times, and that is since last June.

Q. Since last June. That is what I am getting at. A. Yes.

Q. And you state, from your experience in driving the car and having in mind the condition of the crossing generally or at any particular time, that in driving toward the O'Neill side, we'll call it, that when you would get up by the crossing to make your turn, you swing out on the left, do you not?

A. That's right.

Q. Instead of approaching the crossing ordinarily on this road that I am pointing to, instead of keeping your car to the right of what we might call the center line, because of the curvature, no other cars approaching, you get over to the left side, do you not, in order to make that turn more easily?

A. Not because of the curvature, because of the planks on the crossing. [363]

Q. Planks on the crossing, all right. Now, Mr. O'Neill, Mr. Connelly showed you Exhibit 31—

The Clerk: He showed him Exhibit 30, I think.

Mr. McKevitt: Oh, was it 30?

Q. And he confined you to the condition of the

(Testimony of Lawrence Shaw O'Neill.)

planking as shown in the first of a series of four pictures. You see, this is a panoramic view.

A. Uh-huh.

Q. Now, examine the whole photograph. Observe the Milwaukee viaduct is up here so you are oriented, are you not (indicating)? A. Yes.

Q. Now, it is agreed, Larry, that these photographs were taken March 10th, that is, of 1952, two days after the accident, and that the camera in this picture is 25 feet south of the crossing approaching the O'Neill side. It is a fact, is it not, that those photographs are a fair representation of the conditions that existed on that crossing, to your knowledge, on the 8th of March, 1952; isn't that correct?

A. Yes, they are.

Q. That's right.

The Court: What number was that again, Mr. McKevitt? I think you gave it, but I missed it.

Mr. McKevitt: No. 30. [364]

The Court: All right.

Q. (By Mr. McKevitt): Larry, I will show you another panoramic view, and this is Exhibit 31 of Defendant's, and for your information it is agreed that this picture was likewise taken on the 10th of March, 1952, and it is agreed that the camera was in the center of the road 180 feet south of the crossing. Will you examine the whole picture?

A. I didn't go down this far down the road very soon after the accident, no.

Q. Well, are you able to state whether or not what is shown in that picture is a fair representa-

(Testimony of Lawrence Shaw O'Neill.)

tion of the conditions that existed on the 8th of March, general conditions, 1952? A. Oh, yes.

Q. It is, is it not?

Mr. McKevitt: That is all, your Honor.

The Court: Any redirect examination?

Mr. Connelly: Yes, your Honor, we have a brief redirect.

Mr. McKevitt: Oh, may I, I did overlook just one thing?

The Court: Yes, all right.

Mr. McKevitt: May I be indulged, your Honor?

Q. I will show you Defendant's Exhibit 17, Larry, and it [365] is also agreed between us here in court on behalf of each of our clients that that picture was taken on March 10, 1952, two days after the accident, and the camera is east of the crossing and showing the view to the west. Will you examine that, please? Is that a fair representation of the condition that existed on that crossing on that date?

A. Yes.

Q. Now, I will ask you the same question with reference to Defendant's 16?

A. What one is that one?

Q. That was also taken two days after the accident, and the camera in this instance is west of the crossing and looking east, just the opposite of the other one. Is that a fair representation of the condition of the crossing at that date?

A. Yes.

Mr. McKevitt: The answer was "yes," if the jurors didn't hear it. That is all.

(Testimony of Lawrence Shaw O'Neill.)

Redirect Examination

Q. (By Mr. Connelly): Mr. McKevitt asked you something, Larry, with reference to the direction in which the girl ran and what might [366] have happened had she run some other direction, and it is not quite clear to me what you meant by your answer.

As I understand it, when you saw the girl and before she started to run, she was somewhere near the left front door of the car?

A. The left door.

Q. The left door. There was only one door, of course?

A. Yes.

Q. Two doors in a panel truck. When she started to run, she ran generally in a northerly direction?

A. That's right.

Q. And could you tell whether the left front door of the panel truck was closer to the northern-most rail of the track or to the southern-most?

A. It looked closer to the southern-most.

Q. It looked closer to the southern-most.

A. Yes.

Q. And the truck, of course, was some six, seven feet behind, then, as she stood there by the door, wouldn't that be correct?

A. Uh-huh.

Q. And the rails from the southern-most to the northern-most are something over 4 feet, 4 feet, 8½ inches, I believe Mr. McKevitt said. [367]

Mr. McKevitt: From inside of rail to inside of rail. That is the gauge which is common.

Mr. Connelly: Inside of rail to inside of rail.

(Testimony of Lawrence Shaw O'Neill.)

Q. So, as a matter of fact, it is actually about a toss-up, isn't it, which way that——

Mr. McKevitt: I think this is cross-examination of his own witness.

The Court: Well, I will permit him to answer. I think it is a little bit leading, but he may answer it.

Mr. McKevitt: Understand the question?

The Court: Do you understand the question?

Q. (By Mr. Connelly): I say it is about a toss-up which way she ran, isn't it?

A. I don't think so.

Q. Pardon me? A. I don't think so.

Q. You don't think so? A. No, I——

Mr. McKevitt: Go ahead, finish.

Q. (By Mr. Connelly): Did you have occasion to see the truck as it lay on the track with the engine bumped into it after the collision, Larry?

A. Would you repeat that, please?

Q. I say, did you have occasion to see the truck as it lay on the track after it was bumped into by the engine [368] and, naturally, after it came to rest, as you say, some 1,400 feet down the track?

A. No, I didn't go up there.

Q. You didn't go down at all to see?

A. Not up to the engine.

Mr. Connelly: Will you mark this. Well, we will mark this later, then.

The Court: Yes, all right.

Q. (By Mr. Connelly): With reference to Defendant's Exhibit 29, Larry, Mr. McKevitt ques-

(Testimony of Lawrence Shaw O'Neill.)

tioned you concerning visibility in the right of way. Will you examine Defendant's Exhibit 29, please, and tell us whether or not your grandmother's house appears in that picture?

A. Yes, that is it there (indicating).

Q. That is it there. And further examining Defendant's Exhibit 29, you notice what appears to be a billboard showing in the photograph.

Mr. McKevitt: I can't hear you, Mr. Connelly.

Q. (By Mr. Connelly): Do you notice what appears to be a billboard showing in the photograph?

A. Yes.

Q. And between the house and the billboard, would that be the position where you fellows were working that day? A. Yes.

Q. And would it be relatively close to the billboard, the field in which you were working? [369]

A. No, that was about halfway in between.

Q. Halfway in between.

Mr. Connelly: If your Honor please, I think this is——

The Court: Is that in evidence?

Mr. Connelly: That is in evidence.

The Court: Exhibit what?

Mr. Connelly: Exhibit 29, Defendant's Exhibit 29.

The Court: Oh, Defendant's Exhibit 29. Perhaps you might have the witness mark in there the location. I am not looking at the photograph, I don't know just how definitely he has fixed the spot.

Mr. Connelly: Well, there is his house, your

(Testimony of Lawrence Shaw O'Neill.)

Honor, (indicating) and there is the billboard on the field, and they were in a field, apparently from his testimony——

The Court: Well, yes, you use your own judgment. I won't suggest one way or the other that it be marked or not.

Mr. McKevitt: Oh, I see what you mean.

Mr. Connelly: Here is the house, the O'Neill house; there is the billboard which is down toward the highway, of course, and in between, I judge along in here, is where they were working.

Mr. Etter: Let's mark the house and billboard, then, don't you think so?

Mr. McKevitt: Well, if the witness, if the Court [370] please, can more accurately locate where the boy was——

The Court: Yes, I suppose.

Mr. McKevitt: I have no objection to that, if he can do it.

The Court: I think Mr. Etter's suggestion was that he mark the house and the billboard.

Mr. Connelly: Draw something right in there, an arrow. I don't know, these pencils won't write on the photograph.

Mr. Etter: Maybe a pen will do it.

(Mr. Connelly marks on Exhibit 29.)

Mr. Connelly: And, likewise, I will mark and label the billboard.

(Mr. Connelly placed another mark on Exhibit 29.)

Q. Now, if you will make an "X", if you can,

(Testimony of Lawrence Shaw O'Neill.)

Larry, on the photograph showing approximately where the men were working.

A. I will put an arrow. (Marking exhibit.) It isn't in a direct line with the house and the billboard, but——

Q. Well, it approximates the position where the men were standing and working? A. Yes.

Q. Showing you Plaintiff's Exhibit 12, Larry, will you examine that, please, and tell the jury whether or not [371] that fairly depicts the angle of approach and the degree of grade of approach of an automobile traveling toward O'Neill crossing coming from the south?

Mr. McKevitt: I object to that as asking for a conclusion of the witness. I believe the photograph speaks for itself, your Honor.

Mr. Etter: No, I think——

The Court: You asked if that was a fair representation?

Mr. Connelly: Yes.

The Court: I will overrule the objection.

Q. (By Mr. Connelly): Fairly depicts, I believe I said? A. Yes, it does.

Q. Your answer is yes, that it does.

Mr. Etter: Which exhibit number is that, Mr. Connelly?

Mr. Connelly: That is Plaintiff's Exhibit No. 12.

Mr. Etter: No. 12.

Q. (By Mr. Connelly): Showing you Defendant's Exhibit 24, will you examine that, please, and tell the jury whether or not that is a fair repre-

(Testimony of Lawrence Shaw O'Neill.)

sensation of the condition of the foliage as it existed at the time of the accident or a day or so afterwards? A. Yes, it is.

Mr. McKevitt: What number is that, Ellsworth, please? [372]

Mr. Connelly: That is No. 24, Defendant's exhibit.

Mr. Etter: Defendant's?

The Court: Yes.

Q. (By Mr. Connelly): And showing you Defendant's Exhibit 22, will you take a look at that, please, Larry, and tell us again whether or not that fairly represents the condition of the foliage on the southern side of the right of way as it existed about the time of the accident?

A. Yes, it does.

Q. And showing you Defendant's Exhibit 23, will you look at that, and I will ask you the same question as to whether or not that fairly represents the condition of the foliage along the southern side of the right of way as it approaches O'Neill's crossing? A. Yes.

Q. And Defendant's Exhibit 21, will you examine that, please, and I will ask you the same question? This is, as you can see, they are labeled at the top—— A. Yes.

Q. And the camera, of course, is facing westward in each instance, and in this particular Exhibit 21 it is 350 feet back from the crossing, and I will ask you whether or not that is a fair representation of the condition [373] of the foliage along

(Testimony of Lawrence Shaw O'Neill.)

the south side of the right of way as it comes up?

A. Yes, it is.

Q. Your answer is yes in each instance?

A. Uh-huh.

Mr. McKevitt: The last one was what?

Mr. Connelly: The last one was 21, Mr. McKevitt.

Mr. McKevitt: Oh, yes. You examined on 21, 22, and 24, is that correct, Ellsworth?

Mr. Connelly: Examined on 12.

Mr. McKevitt: Oh, yes.

Mr. Connelly: 21, 22, 23, 24 and 29. 29 was the one that was marked by the boy.

Mr. McKevitt: Okay.

Mr. Connelly: I believe we may be approaching the noon recess, your Honor, but I think, unless you have some objection, I would like to ask the jury to examine Exhibit 29 again, the one the boy marked.

The Court: Yes, all right.

Mr. Connelly: To get at this time where they all stood.

Mr. McKevitt: Well, that is with reference to the billboard and the house?

The Court: Shows the billboard and the house.

Mr. Connelly: That is the one with reference to the billboard and the house. [374]

And that is all I have, Larry, thank you.

The Court: Do you have any other questions, Mr. McKevitt?

Mr. McKevitt: No, your Honor.

The Court: You may step down, then. Do coun-

(Testimony of Lawrence Shaw O'Neill.)

sel have any objection to the jurors examining this during the recess?

Mr. McKevitt: No.

Mr. Etter: No, your Honor.

The Court: All right, you may take that out with you to the jury room and examine it, and we will recess for ten minutes.

(Witness excused.)

(Whereupon, a short recess was taken.)

The Court: Proceed.

Mr. Etter: Call Mrs. Everett, please.

RENA EVERETT,

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Q. (By Mr. Etter): Mrs. Everett, I am going to ask you, I know your voice [375] isn't very loud, I am going to ask you to speak out as well as you can. A. All right.

Q. So the jurors and the Court and counsel can hear everything that you have to say.

Your name is Mrs. Ernest Everett?

A. Yes, Rena Everett.

Q. Rena Everett. And you live near Ellensburg with your husband, Ernest Everett, who has testified? A. Yes.

Q. You people have been married, or were married, 29 years last Saturday? A. Yes.

(Testimony of Rena Everett.)

Q. You have three children, as I understand it, or four? A. We had four.

Q. You had four. Three girls and a boy, is that correct? A. Yes.

Q. And Erna Mae was one of the daughters?

A. Yes, the youngest.

Q. The youngest. She was about 16 years and 11 months at the time of this accident?

A. That's right.

Q. Is that correct? A. That's right.

Q. And on the day of this accident, it was a Saturday, was it, Mrs. Everett? [376]

A. Yes, it was.

Q. It was. Were you at the home place on that date? A. Yes, I was.

Q. Mr. Everett was home?

A. Well, yes, he was working out, he wasn't in the house.

Q. He wasn't in the house, he was working?

A. Yes.

Q. Directly in front of your house facing or running parallel, rather, with the county road, is there a little stream or creek? A. Yes.

Q. And Mr. Everett has built a little bridge of planking across that?

A. Well, he was—that bridge was there when we bought the place.

Q. When you bought the place?

A. But there was another bridge below that, an old bridge that he was tearing out that afternoon.

Q. That he was tearing out?

(Testimony of Rena Everett.)

A. Uh-huh, tearing it out of there.

Q. You say below, would it be to the east?

A. Below——

Q. Beg your pardon? A. South of it.

Q. To the south?

A. South of the bridge that we use.

Q. South of the bridge which you use?

A. Uh-huh.

Q. All right. And on that morning, do you recall Erna Mae, about the time that she left to go down to the mail box?

A. Well, it was in the afternoon when she went to the mail box.

Q. It was in the afternoon?

A. Uh-huh.

Q. And do you, to your knowledge, know whether she had any personal or special purpose that day in going after the mail?

A. Well, she had ordered some dress patterns and she kind of was looking for them, she expected them to be in the mail, some of them, anyway.

Q. And had so indicated to you?

A. Yes.

Q. I see. Where were you when Erna Mae left to go after the mail?

A. I was in the house.

Q. You were in the house?

A. I was sewing, I was sitting by a window, I watched her as she left. [378]

Q. I see. Was she out in the yard working just before she left?

(Testimony of Rena Everett.)

A. She had been in the morning. They had been dragging the road and kind of leveling it up. She had been helping her father.

Mr. McKevitt: It is a little difficult to hear in here, Mrs. Everett.

Mr. Etter: She had been helping her father drag the road in the morning.

Mr. McKevitt: I see.

Q. (By Mr. Etter): And did she then come into the house?

A. Yes, and they were all in for lunch, and then my husband had gone back out and the little boy and were tearing out the old bridge and she was helping around the house then.

Q. I see. And when she left, she left from the house, she wasn't outside? A. Yes.

Q. All right. Did you see her leave?

A. Yes, I did.

Q. Did you see the truck leave the front yard?

A. Yes, I did.

Q. And when was the last that you saw of the truck?

A. I saw—I saw her as she went out through the outer gate. It was open, the outer gate to the country road [379] was left open at that time.

Q. I see.

A. And I noticed as she went out our lane and onto the county road and turned to go.

Q. Mr. Everett opened the gate, did he not, up by the barn? A. Yes.

(Testimony of Rena Everett.)

Q. That was the one that fences in the property by the barn? A. Yes.

Mr. McKevitt: Do you understand, Mr. Etter, it is her testimony that is the last time you saw Erna was when Erna went out the gate?

A. She had gone out the gate and out the outer gate.

Mr. Etter: Out the outer gate.

Mr. McKevitt: I see.

A. Onto the county road.

Mr. McKevitt: That is the last time?

Mr. Etter: I am going to find out.

Q. Is that the last time you saw the panel truck, after she went through the outer gate onto the county highway?

A. That is the last time I ever saw it.

Q. I see. Did you later on that afternoon, did you go down to the railroad yourself, Mrs. Everett?

A. No.

Q. You did not?

A. Mrs. Klocke called me and Mrs. Klocke called me and told me there had been an accident at the crossing, and I never even thought of the train, I was thinking of cars on the highway. And I went out to call Mr. Everett to tell him, and he wasn't within calling distance, I couldn't make him hear me. I didn't know, but he had already started up and this Whitson had come down and picked him up and taken him back up there, though I didn't know that.

Q. You did not know that?

(Testimony of Rena Everett.)

A. No. So I come back and I called Mrs. Klocke and asked her how bad, where the accident was, and she said it was on the railroad crossing. And I hung up and started to run out that way and I got out to about to the gate and I know something compelled me to look back, and my mother was standing there and I just turned and walked back to the house and I stayed there.

Q. I see. Your mother lives with you?

A. Yes.

Q. You did not, then, see the crossing or the track or the area that is indicated on the chart down at the crossing on that day?

A. No, I didn't. [381]

Q. I see. Had you been over that crossing yourself, Mrs. Everett?

A. Oh, yes, we had lived there about two years.

Q. I see. And when was the last time that you had been over the crossing?

A. The day before.

Q. The day before? A. Yes.

Q. Was that in the same car? A. Yes.

Q. The panel Dodge?

A. In the panel, yes.

Q. And were you accompanied by your husband, Mr. Everett, that day? A. Yes, yes.

Q. How was the Dodge automobile? I mean, how did it operate that day?

A. It worked all right.

Q. Beg your pardon?

(Testimony of Rena Everett.)

A. It worked just like always, just all right, just fine.

Q. I see. When you drove to town, where did you go that day?

A. We went to town to get groceries and supplies.

Q. That was the day before? A. Yes.

Q. I see. Were you acquainted, Mrs. Everett, with the crossing? A. I am.

Q. That is the grade crossing where this accident occurred? A. Yes.

Q. I will show you the exhibit here which is marked No. 30, and there is indicated a panoramic view of the general area extending from the crossing, as you can see, down to the overpass. I will ask you to examine the crossing particularly there. This picture, as you can see, was taken, or has been indicated was taken, a couple of days or so after that accident. A. Yes.

Q. Would you say that is a fairly accurate representation of the crossing? A. Yes.

Q. And is it a fairly accurate representation, likewise, of the outer approach or the outer plank-ing as it appears there? A. Yes.

Q. It is.

The Court: What number is that again?

Mr. Etter: That, your Honor, is Defendant's 30, No. 30. [383]

Q. Had you noted the condition that you have seen or that you pointed out in the Defendant's

(Testimony of Rena Everett.)

Exhibit No. 30 before with respect to the depression there just before you reach the planking?

A. Yes, we had, we had talked about it.

Q. I see.

Mr. McKevitt: I move to have that last remark stricken, that "we talked about it."

The Court: Yes, I think that should be stricken and the jury instructed to disregard it.

Q. (By Mr. Etter): You had seen that, you had noticed that area before, however?

A. Yes.

Q. I see. Now, as you approach in an automobile, as you approach that particular crossing, Mrs. Everett, can you give us some idea of the visibility, the driving visibility, whatever it might be as you approach the crossing, of the overpass which appears on the chart, toward the east end of the chart as marked?

A. I find that I can't see the overpass until I am almost directly on the track.

Q. And can you tell us, have you determined why that is?

A. Well, it is the sharp angle of the road and turn as you come right onto the crossing. You have to make a turn almost on the crossing. [384]

Q. That is, going over onto the other side?

A. Yes, to cross over.

Q. I see. Have you noticed anything, or did you notice anything prior to this time with respect to vegetation, the growth and brush along there?

A. Yes, there is a lot of brush growing in there.

(Testimony of Rena Everett.)

Q. I see. And there was and has been, or rather was, prior to the date of this accident?

A. Yes.

Q. I see. Now, on that date, did you hear the train at all, Mrs. Everett?

A. No, I didn't.

Q. In other words, you were in the house?

A. I was in the house.

Q. At all times? A. Uh-huh.

Q. Now, Erna Mae was a junior, was she, in high school? A. Yes.

Q. Can you tell us what the condition of her health was prior to her decease?

A. She was a good, healthy girl.

Q. She was a good, healthy girl? A. Yes.

Q. And, likewise, can you tell us what her situation was with regard to her grades and progress in high school? [385]

A. Yes, she got good grades.

Q. And can you tell us, likewise, with respect to her activities in her high school classes?

A. Well, just then she was to start on a project of making a spring wardrobe in some of the classes at school.

Q. Part of the domestic science courses?

A. I expect that is it.

Q. Would you say that she had some considerable ability in that regard?

A. Yes, she did, she sewed nicely.

Q. Now, with respect to her assistance about the

(Testimony of Rena Everett.)

home, that is, with regard to you and to Mr. Everett?

A. She helped her dad an especial lot. Of course, we have a small house and there isn't so much work in the house to do, but she always did her part, too, in the house, but she specially helped her dad, she liked to be out.

Q. I see. Now, I might ask you, too, what work that she did do around the house, what was she capable of doing?

A. Most any of the house work.

Q. And with regard to the work that she did with her father, Mr. Everett?

A. Well, she run the tractor, she plowed, and she helped him put up hay.

Q. You say that she operated the tractor? [386]

A. Yes.

Q. Did she operate it capably and efficiently?

A. Well, we thought so.

Q. You thought so. She could handle that mechanical device? A. Yes.

Q. And was it necessary, Mrs. Everett, in the position, that is, of you and of Mr. Everett and your family, that she did help out?

A. Yes, it was, he had to work, too, besides the place.

Q. In other words, do you own the place entirely yet? A. No, we are still paying for it.

Q. Beg your pardon?

A. We are still paying on it.

Q. You are still paying for it? A. Yes.

(Testimony of Rena Everett.)

Q. And you, as Mr. Everett said, have some sheep? A. Yes.

Q. And some pastureage, is that correct?

A. Yes.

Q. And he works at the mill? A. Yes.

Q. There in Ellensburg, is that correct?

A. Yes.

Q. And did Erna Mae, during the summer, the summer [387] previous, did she help with the work, that is, the farm work?

A. Yes, she plowed the whole lower field.

Q. The whole field? A. Yes.

Q. Did she also help with the chores?

A. Yes.

Q. And that was true the year before and up until the time of her decease?

A. That was the year before; that is, that spring we hadn't started in the spring work yet.

Q. You hadn't started the spring work?

A. No.

Q. Did she work, likewise, with her father on the farm during the summer? A. Yes.

Q. She did? A. Yes.

Q. And would you say she made a sizeable contribution by virtue of her labor?

A. Well, I would say so.

Q. You would say so.

Mr. Etter: I think that is all, Mrs. Everett.

Cross Examination

Q. (By Mr. McKevitt): Prior to coming to the

(Testimony of Rena Everett.)

Ellensburg vicinity, Mrs. Everett, you folks lived over in Kalispell? A. Yes.

Q. Flathead Valley? A. Yes.

Q. You know where the old West Side School is over there? I lived there about seven years.

A. Oh.

Q. Now, when you were living in Kalispell, was your husband engaged in farming operations?

A. We had 10 acres there.

Q. And on that 10 acres, did she do any work with the tractor or plowing, Erna Mae?

A. Yes.

Q. Over there?

A. And she helped a neighbor she worked for a neighbor there quite a bit, and during haying time she drove his tractor.

Q. It wouldn't take very long, though, to plow the 10 acres, would it?

A. No, no, not that.

Q. And how much acreage do you cultivate and plow down there on this 80-acre tract? [389]

A. Out where we are now?

Q. Yes? A. Not any since.

Q. Well, let's see, you went there in the fall, November of 1950?

A. Yes. Well, they estimated it was 30 acres, around 30 acres, she had plowed in that lower field in the spring of '51.

Q. Did she plow those 30 acres, then, in '51 sometime? A. Yes.

Q. And how long did it take her to do that?

(Testimony of Rena Everett.)

A. Well, she had her spring vacation from school and about Easter time, I think.

Q. I was just wondering how long it takes to plow 30 acres. I don't know.

A. Well, I wouldn't remember just how long she was at it.

Q. Well, would she work steadily? Could she do it in a day's time, two days, or what?

A. I don't know. She was more than one day, of course, I know that, but exactly how many days she worked on it, I don't remember.

Q. She didn't do any plowing to use the tractor in '52, did she? A. She may have.

Q. She met her death on the 8th of March.

A. She was driving the tractor that morning.

Q. On that morning. Well, in driving the tractor, what was she doing particularly?

A. Well, she was driving the tractor dragging a drag behind it to level up the road.

Q. Oh, I see.

A. Her father was riding on it.

Q. Now, the day of this accident was Saturday, is that correct? A. Yes.

Q. And she had a special reason for going to the mail box to procure some dress patterns?

A. Yes.

Q. And how often was that mail delivered out there on that rural delivery proposition?

A. Every day except Sunday.

Q. What was the practice in your family prior

(Testimony of Rena Everett.)

to March 8, 1952 of going after the mail? How frequently would you——

A. Mr. Everett usually stopped by the mail box on his way home from work.

Q. Pardon me?

A. Mr. Everett usually stopped at the mail box on his way home from work and would bring the mail home during the week days while he was working. [391]

Q. Well, how many occasions prior to this date had Erna Mae taken that truck and driven over that crossing to get the mail?

A. Well, I wouldn't know exactly how many. Several times. Not that spring, that was the first day since in December that she had drove.

Q. The last time she drove that truck prior to the date of her death was when?

A. Was in December, I think, sometime.

Q. Of 1951? A. Yes.

Q. And where did she drive the truck to on that occasion?

A. Up for the mail. She never drove it any place else.

Q. Then, she hadn't driven the truck in between that interval at any place, at any time, did she? Your answer is "no"?

A. Yes, that is what I said, no.

Q. So she had had very little experience prior to her death in operating that truck over that crossing; that is true, isn't it?

(Testimony of Rena Everett.)

A. Well, she had driven over it several times the fall before.

Q. Well, several times, you mean by that what? Would it be four or five?

A. Oh, more than that. I wouldn't know. [392]

Q. Would you say, in the whole period of time that you lived there from November, 1950, to March 8, 1952, that she had driven that truck over that crossing 25 times, that many?

A. Oh, yes, I would say at least that many times.

Q. Going to get the mail only on each occasion?

A. Yes.

Q. And in different months?

A. Yes.

Q. Do you think that she drove that truck over that crossing to get the mail in March of 1951?

A. No, she didn't.

Q. On any occasion prior to going over the crossing on that date, do you know whether she ever had an experience where she stalled the truck on that crossing?

A. No, I don't believe she ever did. We certainly never knew of it.

Q. Did she advise you that she wanted to take the truck and go over and get the mail?

A. Yes, she did.

Q. And she asked her father's permission and yours? A. Yes, she did.

Q. And did you hear her father, as he testified yesterday, tell her to watch out for trains?

(Testimony of Rena Everett.)

A. I didn't hear him, I was inside the house. I didn't [393] hear what their conversation was at all.

Q. Well, on previous occasions, I assume that you, yourself, when she would take that truck to go over that crossing, would tell her to watch out for trains? A. Yes.

Q. Because you knew it was the 'main line of the Northern Pacific? A. Yes.

Q. And many passenger or freight trains pass over it each day of the week, day and night; isn't that true? A. Yes.

Q. Now, I believe you testified that you went over that crossing in that truck, was it the day before, Friday? A. Yes.

Q. Who was driving it on that occasion?

A. My husband.

Q. Was Erna Mae in the truck?

A. No, she wasn't.

Q. Going over it the day before, the crossing was in about the same condition as it was on the 8th?

A. Yes.

Q. Did you have any difficulty going over it on Friday, the 7th? A. Well——

Q. Huh? [394]

A. We always——my husband always shifted down to go over it.

Q. Yes. Well, whatever depression there was in the crossing on the 7th, you got over the crossing without any difficulty after shifting gears, didn't you? A. Yes.

Q. Now, I believe it was your testimony, Mrs.

(Testimony of Rena Everett.)

Everett, that because of the curve in the roadway approaching the crossing, that you can't see the Milwaukee viaduct until you are almost on the crossing; is that your testimony?

A. That's right, from the driver's seat.

Q. And that is because of the angle?

A. Yes.

Q. Well, supposing that this is the railroad track here running east and west, which it does, this jury rail does, and she is approaching in this direction, of course, if she were approaching it at direct right angles, how far from the crossing would the front end of the truck be before she could see clear up to that viaduct?

A. If she was in a direct line, which she isn't on that road——

Q. But assuming that she was in direct line with it and the front end of the truck is 25 feet, we'll say, from [395] the crossing, under those conditions, she would be able to see clear up to the viaduct and beyond, wouldn't she?

A. Well, I never measured it, I couldn't say.

Q. But your testimony is based on this situation: Instead of facing in that direction, was she facing about like this (indicating), the track running in that direction?

A. Or even more to the side.

Q. Like this (indicating)?

A. Yes, more like that.

Q. Well, you can't get me around too far, you will have the road parallel with the track now.

(Testimony of Rena Everett.)

A. Well, it is, almost.

Q. Well, you don't mean to say, leave the jury under the impression, when she approaches that crossing, that she is 25 feet from it, that her back is toward this train?

A. As you come up on that crossing from our road up there, you are looking almost up the track to the west.

Q. Well, take on the occasion when you and your husband drove over it on Friday, as he drove up there, when he got the front end of his truck 20 feet from the track, if he had turned his head just in that direction, he would have a view up the track, just a half turn of the head; isn't that all that is required?

A. I would say you would have to be closer than that. [396]

Q. Well, I will show you, then, the Defendant's Exhibit 25, Mrs. Everett——

The Clerk: That is the wrong number, Mr. McKevitt.

The Court: 30.

Mr. McKevitt: 30. I looked at the camera number.

Q. This is a series of 1, 2, 3, 4 photographs, put together in what we call a panoramic view, Mrs. Everett. Now, your counsel has agreed that these pictures were taken two days after the accident, which would be on the Monday following, or Tuesday, and the camera is in the center of the road on your side of the crossing and it is 25 feet, in

(Testimony of Rena Everett.)

other words, what the front end of the car would be, south of the crossing and facing east and north.

A. How far ahead of that camera—how far is this picture ahead of where the camera was setting at 25 feet?

Q. Well, the camera is setting 25 feet from the center of the crossing.

A. They don't start taking the picture right at your shutter, does it? Isn't it up ahead farther?

Q. It shows 25 feet of approach to the crossing.

A. You had a line marked down here or something.

Q. Well, let me ask you this question: Isn't that a fair representation of the conditions that existed on the day Erna met her unfortunate death? That is correct, [397] isn't it? A. Yes, yes.

Q. You notice this viaduct up here (indicating on exhibit) now, do you mean to say, looking at that picture, that one would have to get his car almost onto the crossing before you could see this viaduct?

A. You have to get almost up there, in the driver's seat, to see up to the viaduct. When you are in the driver's seat.

Q. Is that because of the shrubbery or because of the curve in the road?

A. It is—well, some of both.

Q. Well, where do you see any shrubbery in here that would hide a train? A. No.

Q. A Diesel engine, huh? A. No.

Mr. McKevitt: I believe that is all, your Honor.

(Testimony of Rena Everett.)

Redirect Examination

Q. (By Mr. Etter): Mrs. Everett, looking at Defendant's exhibit again, this panoramic picture, you understand the panoramic picture, as counsel says, is a series of four pictures? A. Yes.

Q. In other words, of the series where the focus of the camera is looking straight ahead will only take in, say, No. 1, then by turning it to the right, No. 2, and by turning it further, No. 3, and by turning it further, No. 4; isn't that correct? Isn't that what you have to do? Isn't that what you have to do with your head or your neck, don't you have to turn it like this (indicating) because of the angle to see up what this picture shows by turning the camera? A. Yes.

Q. Plaintiff's 12, would you examine that for a moment? Is that a fairly accurate representation of the angle at which a car approaches, both with the angle of the railroad track and the angle of incline down the hill on grade? A. Yes, it is.

Q. Is that a fairly accurate representation?

A. Yes, it is.

Q. On No. 12. Now, these pictures that I have here are the Defendant's exhibits, Mrs. Everett. As you see, Plaintiff's Exhibit 21 and the little notation that defendant has, the camera is 350 feet east of the crossing facing west; in other words, looking at the Defendant's Exhibit 1, the chart, that picture would have been taken so that we can match the two here, that [399] picture would have been taken

(Testimony of Rena Everett.)

350 feet east of the crossing looking west. Do you follow me? A. Yes.

Q. In other words, they are all taken——

Mr. McKevitt: You are west or east of the crossing there?

Mr. Etter: That is what it says, east, up here (indicating on exhibit).

Mr. McKevitt: No, but where you are——

Mr. Etter: No, I am talking about this crossing.

Mr. McKevitt: Oh.

Mr. Etter: East of this crossing that I am pointing out here, the grade crossing where the accident occurred.

Q. I am speaking of those pictures. They are all taken east of this crossing looking west toward the crossing. Do you understand? A. Uh-huh.

Q. Now, the first one is 350 feet, correct?

A. That is what it says.

Q. It says up there. All right, will you take a look at the condition of the vegetation, shrubbery and foliage down by that crossing? Can you see it?

A. I can see the foliage and vegetation.

Q. Growing up along here, is that correct?

A. Yes. [400]

Q. All right.

The Court: Is that 21?

Mr. Etter: Yes.

The Court: Yes, all right.

Mr. Etter: 21. Counsel, I think you were going to stipulate with me the height of the crossing pole

(Testimony of Rena Everett.)

that appears on that crossing? Did you have it there?

Mr. McKevitt: Yes. Sawbuck sign, you mean, Max?

Mr. Etter: Yes, the sawbuck sign.

Mr. McKevitt: In other words, what you are referring to is this drawing on the map right here (indicating)?

Mr. Etter: Yes, one of these sawbuck crossings.

Mr. McKevitt: Can we mark that "Sawbuck Crossing?"

Mr. Etter: Mark it anything so we know what it is. That is what it is, or crossarm, probably.

Mr. McKevitt: Put "Crossing Sign."

Mr. Etter: "Crossing Sign."

(Whereupon, the said designation was placed upon Exhibit 1 by Mr. McKevitt.)

Mr. McKevitt: Now, the dimensions of that, I believe you agreed we would stipulate.

Mr. Etter: Yes.

Mr. McKevitt: That it is 12 feet high. I am not referring to the crossarms on it. 12 feet high. And it is [401] 12½ feet from the center of the track, and it is 18 feet from the crossing measured along the rail.

Mr. Etter: That is correct.

Q. You see the crossing on which we have just stipulated as to height? A. Yes.

Q. 12 feet along there (indicating), and this picture was taken a couple of days after the acci-

(Testimony of Rena Everett.)

dent. Would that indicate the foliage pretty well?

A. Well, that is the way it was.

Q. That is the way it was. And here is a view 400 feet east of the crossing. I will ask you to take a look at the foliage on what is indicated up there as the south. That would be looking at the south side, that would be where a car approached.

Mr. McKevitt: Is this for the purpose, Mr. Etter, of having her testify those are fair representations as to foliage?

Mr. Etter: Yes.

Mr. McKevitt: Well, I have conceded them, I have put them in evidence.

Mr. Etter: They are your exhibits.

Mr. McKevitt: I have conceded all that because I offered them in evidence.

Mr. Etter: All right, I will put it in the record, [402] however.

Q. That one is taken 450 feet from the crossing. Would your answer be the same, that that is a fairly accurate representation of the foliage on the south side by the crossing? A. Yes.

The Court: That number is——

Mr. Etter: That number, your Honor, is 22.

The Court: 22, all right.

Q. (By Mr. Etter): Here is one, Defendant's Exhibit 19. That is where the camera is only 250 feet east of the crossing facing westward. Would the foliage as it appears there and the brush be approximately an accurate representation of what it was on that date? A. Yes.

(Testimony of Rena Everett.)

Q. And handing you Defendant's 20, where the camera is just 50 feet further east, or 300 feet east of the crossing, would that be a fairly accurate representation of the foliage and vegetation and brush as it appeared on the south side of the crossing?

A. Yes.

Q. And, again, Defendant's Exhibit No. 24, 500 feet east of the crossing, would that likewise be a fairly accurate representation of the brush and vegetation and otherwise appearing on the south side of the trackage [403] at the grade crossing?

A. Yes.

Mr. Etter: All right, that is all, Mrs. Everett.

Mr. McKevitt: That is all.

(Witness excused.)

The Court: I think it is a little late to call another witness.

Mr. Etter: I think it is late to call another witness. Mr. McKevitt and I, however, have stipulated, in the allegations in the addendum clause of the complaint there is a prayer for \$500.00 for the value of the 1940 panel Dodge delivery truck. We have made inquiries and ascertained that Blue Book and retail price of a Dodge panel delivery truck in 1952 of a 1940 model and find that it was \$300.00.

The Court: I see.

Mr. Etter: So we have stipulated, without calling a witness to that effect, that the value is \$300.00, rather than \$500.00 as alleged.

Is that correct, Mr. McKevitt?

Mr. McKevitt: I have no objection to the reduction, your Honor.

The Court: All right.

If counsel have no objection, I propose to recess [404] for two hours today, rather than the hour and a half. Recess until two, and then if you haven't finished the testimony by that time, continue until five tonight, instead of 4:30.

Very well, court will recess until two o'clock.

(Whereupon, the trial in the instant cause was recessed until two o'clock p.m., this date.)

(The trial in the instant cause was resumed pursuant to the noon recess, all parties being present as before, and the following proceedings were had, to-wit:)

The Court: Mr. Etter.

The Clerk: Your Honor, I am marking Plaintiff's Exhibit 33 for identification.

Mr. Etter: I was going to recall one of the witnesses to identify the picture, but Mr. McKevitt has seen it and he says it may go in without objection.

Mr. McKevitt: That is correct. [405]

The Court: All right.

(Whereupon, the said photograph was admitted in evidence as Plaintiff's Exhibit No. 33.)

Mr. McKevitt: Do you want to explain to the jury what the picture is, Max?

Mr. Etter: Yes. Gentlemen of the jury, this is a picture of the front end of the Diesel and of the panel delivery truck a short time after the accident just before they pulled the truck away. I was just

going to show it to you, you will get it later. That is what it is when it stopped.

(Exhibit 33 handed to jury.)

Plaintiff rests, your Honor.

The Court: I will excuse the jury, then, while we have some matters taken up in your absence.

(Plaintiff rests.) [406]

(Whereupon, the following proceedings were had in the absence of the jury:)

The Court: I assume you would wish to make some motions, Mr. McKevitt.

Mr. McKevitt: Yes. May I, preliminarily thereto, inquire if your Honor feels it is sufficient to go to the jury? Personally, I do not, I otherwise would make extended argument on it, but I don't want to trespass upon your Honor's time if you are convinced in your own mind that there is sufficient to make us go forward. I don't think so. I await your Honor's pleasure in that regard.

The Court: Well, it was my view that there is enough to submit the case to the jury here, although I am very doubtful about some of these grounds of negligence, but, of course, my only problem now is to determine whether or not to direct a verdict for the defendant.

At the close of the case, if it goes forward, I think counsel should be prepared to discuss seriously to the Court these individual allegations of negligence and determine which ones should be submitted to the jury.

Mr. McKevitt: Very well, then, what I will do is make the formal motion at this time and your

Honor will rule on it, and then following that I will ask your Honor to withdraw certain allegations from the jury's consideration before going forward with our testimony, if that meets [407] with your Honor's approval. I think that is the practice we have indulged in before down here in a similar case. I believe it was the Dean case, if you recall.

The Court: Yes, I believe so. I am a little doubtful about that procedure. I think maybe that should come at the close of all the testimony.

What I have in mind here is, if the plaintiff hasn't made a *prima facie* case, of course, then the defendant is entitled to have the case end at the conclusion of the plaintiff's evidence and have the jury directed to return a verdict for the defendant. If, however, there is any substantial factual question, any substantial evidence to submit to the jury, it seems to me that about the only thing the Court can in propriety do is to deny the motion and direct that the case go forward, because I think that the plaintiff would have the right from your witnesses in your case to draw out facts that would support some of these other allegations, and if he does, why, he is in, whether it comes from your testimony or from his. I think that is the proper practice here.

For instance, if I instructed this jury that everything was withdrawn except blowing the whistle, we'll say, just using that by way of illustration, and then you put on witnesses and on cross-examination the plaintiff brings out there is negligence in other particulars, I [408] think that——

Mr. McKevitt: Oh, I see your point.

The Court: —he would have a right to have those issues go to the jury.

Mr. McKevitt: I will state the motion briefly and the reasons for it and await any motion to withdraw until the conclusion of all the testimony.

The Court: Yes, until the conclusion of all the testimony. That is what I had in mind.

Mr. McKevitt: Very well, your Honor.

The Court: Then I will seriously consider each one of them.

Mr. McKevitt: Very well.

The plaintiff having rested, the defendant Northern Pacific Railway Company now challenges the sufficiency of the evidence to support the material allegations of the complaint and moves the Court to instruct the jury to return a verdict in favor of the defendant railway company.

This motion is made and based upon the following grounds:

The allegations of negligence upon which the plaintiff relies for recovery in this instance are found beginning with Paragraph VI. In that paragraph, Subdivision (a), it is alleged that: [409]

“Defendants drove said train in a negligent, careless and reckless manner and at a speed between 70 and 80 miles per hour, which speed was excessive and dangerous to persons using said crossing at the time, place and under the conditions then existing.”

There is no testimony in this case that would support the allegation of this complaint that this train was going 70 miles an hour or any speed in excess of possibly 60 miles an hour. Furthermore,

with reference to the speed of that train, there has been no showing that there is any speed limit there, either by city ordinance or by state law, and neither has it been shown that any rule of the railway company enacted for the benefit of the traveling public was violated insofar as the speed of this train was concerned.

Subdivision (b) of Paragraph VI alleges that the defendant was negligent in that:

“Defendants failed and neglected to provide and maintain any signal, by mechanical device or otherwise, for the purpose of warning Erna Mae Everett and others of the approach of said passenger train.”

While it is true that there were no automatic signals at that crossing, it has not been shown that it was [410] the duty of the railway company to have installed such signals and, as a matter of fact, the installation of those signals and the necessity for them is something that is determined by the Public Service Commission of the State of Washington, acting in conjunction with the county commissioners of the particular county involved and with the railway company.

Subdivision (d) alleges that:

“Defendants neglected and failed to sound the crossing signals required by the statutes of the State of Washington as the locomotive approached the said crossing, by either blowing a whistle or sounding a bell of said locomotive.”

It is true that the evidence in this case from the standpoint of the plaintiff would leave the infer-

ence that this crossing signal did not commence at the whistling post 80 rods distant from the crossing as by law required. However, the Supreme Court of the State of Washington has held on many occasions that even though there had been a failure to give these crossing signals in any particular, yet, if from the physical facts it is apparent that the driver of the vehicle in question had a sufficient view along the track of the approach of that train, then the failure to accord the right of way to the railway company, [411] which it is entitled to under the law, was contributory negligence as a **matter of law**.

The evidence clearly shows in this case, with reference to that subdivision, that this girl was warned of the approach of this train for at least, under the testimony of the defendant, a distance of 635 feet, which I think is the distance—I believe we are agreed on that; it is subject to scale—from the underpass to the crossing, and that those signals, in and of themselves, were sufficient warning to her, because, accepting the testimony of the plaintiff, at a speed of 50 miles per hour, would mean that that train was traveling 75 feet per second, which would mean that at least she had eight to ten seconds warning of the approach of that train. And the evidence further shows that she was given sufficient warning of the approach of that train to enable her to open the door of the panel truck, close the door of the panel truck, and take three or four steps in a direction away from the approaching train before the truck was struck.

With reference to Subdivision (e) of Paragraph VI, namely, that:

“Defendants negligently failed to stop said train, slacken its speed, or give timely or adequate warning of its approach to said crossing when the persons [412] operating the said train saw, or, by the exercise of ordinary care, would have seen, Erna Mae Everett and plaintiff’s panel truck in a position of imminent peril of being struck by the said train;” as the defendant construes that allegation, it is an attempt to invoke, at least in part, the doctrine of last clear chance, and, of course, there is no evidence which would justify the Court in submitting to the jury the issue of last clear chance, because, as your Honor well knows, and from the decisions of the Supreme Court, of which you were a member, the determination of whether the last clear chance doctrine applies is a question of law for the Court to determine in the first instance.

There is no testimony here of a probative value that the speed of this train wasn’t slackened, and, even accepting the testimony of Mr. O’Neill and his son that they didn’t see anything or indicate anything that the speed of the train was slackened, the only purpose for taking a position of that character by the plaintiff would be that, had the speed of the train been slackened at a certain point where the engineer saw this position of peril, that it would have given this girl an additional interval of time within which to get out of the position in which she placed herself. Now, clearly, under the evidence in this case, [413] that would require expert testi-

mony as to by a certain brake application at a given point, this train could have been slowed down from a rate of speed, we'll say, taking their figure, 50 miles an hour, to whatever it would be—I don't know—45 or 50 or 30, and then you have to consider the time interval, which is undoubtedly what they have in mind in this case, and, of course, under the present state of the record, it is just purely speculative.

With reference to Subdivision (f) of Paragraph VI, the contention is made that:

“Defendants negligently maintained said crossing area and right-of-way by failing to cut the natural growth, underbrush and vegetation on its right-of-way near said crossing, with the result that said natural growth of underbrush and vegetation obstructed the view of defendant railway company's tracks from persons driving upon O'Neill Road and approaching said crossing from the southerly direction.”

I address my argument with reference to that allegation on several grounds, and the first ground that I call to your Honor's attention is that when we speak of the right of way of this defendant, there isn't a scintilla of [414] evidence in here to show how wide that right of way was at that point at that time, whether it was 10 feet or 15 feet or 200 feet, and, of course, it isn't incumbent upon the railway company to maintain that county road. It is incumbent to keep our right of way, as such, in a safe condition. But so far as the record here is concerned, your Honor doesn't know the width of

that right of way at that time because no witness was interrogated in that regard.

And, furthermore, and apart from that objection to that allegation, the defendant insists that under the photographs introduced here in evidence, and which are physical facts that speak louder than words, it cannot be urged that that right of way in that vicinity was so covered with brush as to obscure the approach of this train. There isn't any testimony as to how high the brush was. There is some testimony to the effect that, well, you couldn't see that train until you practically got on the crossing. Well, that is tied in not only with the brush area, so-called, but the curvature of that road. Well, the grade of that road and its curvature, whether it is good, bad, indifferent, or dangerous, is something that is the fault of Kittitas County and not the Northern Pacific Railway. No showing here that we were supposed to maintain any portion of that area there except the area that is covered by the planking on the outside of each rail, and that is where our duty [415] began and ended.

Subdivision (g) is that:

“Defendants negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to said crossing and immediately next to the wooden planking at said crossing.”

Well, I have already said that it is not our duty to maintain the roadway leading up to the crossing. With reference to the contention “immediately next to the wooden planking,” it is assumed there is

merit in that, but what evidence here is there that would in any wise justify submitting that planking condition to the jury as a possible proximate cause, when there is an utter absence of evidence from any source as to whether or not that planking condition had anything to do with this truck stalling? There isn't anyone that has seen this truck approaching that crossing and there isn't anyone that knows how long it was on the crossing and, consequently, there is no evidence to the effect that the drop between the planking and the road surface had anything to do with this truck stalling.

Referring now to Paragraph VII, in the preliminary, prefatory portion of that paragraph it is said that this defendant was guilty of wanton misconduct—wanton misconduct—on the part of the defendants in the operation [416] of the train in the following particulars:

“(a) The defendant's servants on said train intentionally, and with a reckless indifference to injurious consequences probable to result therefrom, drove said train at a speed between 70 and 80 miles per hour, which speed was greatly excessive and dangerous to persons using said crossing at the time and place under the conditions then existing.”

Well, of course, your Honor knows there is no testimony of that speed at all or that speed such as has been testified to was a wanton, reckless and dangerous rate of speed. This is the main line of the Northern Pacific Railway Company; this was a passenger train.

“(b) Defendant's servants operating said train,

saw, or should have seen, that an unusually dangerous situation existed when plaintiff's vehicle, operated by Erna Mae Everett, stalled on said railroad track and said Erna Mae Everett was attempting to abandon and flee said vehicle. Yet, knowing that a failure to warn Erna Mae Everett would probably result in serious injury, the defendants proceeded to run [417] said train into said intersection and against plaintiff's said vehicle without previously giving any signal or warning by blowing the whistle or ringing the bell of the locomotive, or giving warning by way of any other device of any kind whatsoever."

Well, suffice it to say there isn't any evidence of any kind or character to support that allegation. The only evidence in this case as to what existed there was the testimony of this engineer, Mr. Sco-bee, and, as I recall his testimony, it was this, and it is the only evidence touching the approach of the vehicle to the crossing, that some distance east of that crossing, I believe he said 2 or 300 feet, he wasn't exact, he says, "I can't pin point it," but let's assume that it was a thousand feet from the crossing, giving them the benefit of that, or 1,200 feet from the crossing, when he first saw this vehicle approaching that track, whether it was 25 miles per hour; there is no evidence in here that if he saw it at that time or should have seen it at that time, 1,200 feet, that this truck was in a perilous condition of any kind or character; and, as a matter of fact, he says it was going 25 miles an hour and came to a stop and then began bucking

forward, and, of course, his train is moving all the time and no showing of [418] any kind that had he dynamited that train at any particular point, that it would have aided this girl to escape from the predicament into which she placed and found herself.

Subdivision (c):

“Defendants saw, or should have seen, that a collision with Erna Mae Everett was imminent and had the opportunity to realize and appreciate her danger, but the defendants, with reckless indifference to injurious consequences probable to result therefrom, failed to reduce the speed of said passenger train by applying full and sufficient braking power to the wheels of said locomotive and the cars following it.”

That is the last clear chance doctrine, if I correctly interpret that language, and I won't discuss that any further except to reiterate there is no evidence here that would justify the submission of the last clear chance doctrine.

Subdivision (d):

“Defendants wantonly maintained the said crossing in a dangerous condition in that at said time and place the rock and cinder ballast leading up to said railroad crossing and next to the wooden planking at [419] said crossing had been worn or carried away causing the wooden planking to protrude like a barrier above the roadway in an unusual and hazardous manner, and as a result of the foregoing dangerous conditions, plaintiff's vehicle became stalled on said crossing in the path of defendant's train.”

No evidence to support that. No one has testified or given any testimony that would enable this jury to determine, yes, that planking condition had something to do with the stalling of this truck.

The defendant Northern Pacific Railway Company contends that by virtue of the knowledge of this girl of the existence of that crossing and by virtue of the fact that she knew she was approaching a railroad crossing on the main line of the Northern Pacific, by virtue of the fact that she had been warned by her father to watch out for trains; yet, disregarding her knowledge of the crossing conditions and apparently disregarding the admonition and caution given by her father, she got this truck onto that crossing and in some manner stalled it, and it is the contention of the railway company that that was contributory negligence on her part as a matter of law, barring the recovery.

It is also the further contention of the railway [420] company that the father was negligent in two particulars; namely, in permitting this girl to drive this car without a license, and, secondly and apart from that, to permit this girl to drive a truck in the condition that that truck was in and with what now appears to be considerable unfamiliarity with it, because she hadn't driven it since December preceding the accident, and because of the father's knowledge of the many trains that operated over this crossing and its condition, that apart from any license feature, it was negligence to have permitted the girl to have driven the truck under those conditions.

The Court: Well, as I indicated at the outset, I will deny the motions at this time, with the understanding, of course, that the Court will consider the individual grounds of negligence at the conclusion of all the evidence.

Mr. McKevitt: Very well, your Honor.

May I make inquiry at this time if your Honor feels that there is sufficient evidence here to submit the case to the jury on the doctrine of last clear chance? Is that a fair question?

The Court: I haven't definitely made up my mind on that point.

Mr. McKevitt: Very well, I wanted to know if there is some question in your Honor's mind. If you would tell [421] me that you didn't think so, then I wouldn't put on an expert. If you are not clear about it, I will put him on, as long as I have him here.

The Court: I, frankly, am inclined to do so. I quite agree with you, Mr. McKevitt, I see your point and your position here. Ordinarily, I think, expert evidence would be necessary to show whether it would be possible to stop, but here, of course, we have a situation, as I recall, where the engineer testified that he saw the girl on the track about the time he came through the underpass.

Mr. McKevitt: That's right.

The Court: And then we have the testimony of these O'Neills that the girl was just a half a step from safety when the train hit her. She was almost there, they thought she was there. And I think that, aside from any expert testimony, that the jury could

draw a reasonable inference that had that train been dynamited at the time the engineer first saw her on the track, it would have given her another step and her safety from that situation, so that I think it raises the question there where the jury could draw the inference.

Mr. McKevitt: I am glad to have your Honor's pronouncement in that regard, because if your Honor felt there wasn't sufficient grounds to go to the jury on the last clear chance doctrine and I put an expert on, I might, [422] through cross-examination, be made to appear——

The Court: I see your position, you are entitled to know my thoughts on that, and that is my attitude at the present time.

Mr. McKevitt: Thank you.

The Court: All right, bring in the jury.

(Whereupon, the following proceedings were had in the presence of the jury:)

Mr. McKevitt: May it please your Honor, in view of the fact, if it pleases the Court and gentlemen of the jury, that with one exception the witnesses subpoenaed by the defendant to appear at this case have already been called by the plaintiff, I see no necessity for making an opening statement, except to advise the Court that we have one additional witness that wasn't called, Mrs. Nurre, with reference to whistle signals and then we might recall the engineer for one or two questions, then our expert.

The Court: All right.

Mr. McKevitt: Mrs. Nurre, will you come forward? [423]

EVELYN NURRE

called and sworn as a witness on behalf of the defendant, was examined and testified as follows:

Direct Examination

Q. (By Mr. McKevitt): Will you state your name to the Court and jury, and, Mrs. Nurre, you have heard us telling the other witnesses to keep their voices up?

A. Mrs. Evelyn Nurre.

Q. And where do you reside?

A. Ellensburg.

Q. And are you married? A. Yes.

Q. And children? A. Four.

Q. Husband living? A. Yes.

Q. What are you doing, taking care of the children? A. Yes.

Q. Were you living in the vicinity of Ellensburg on March 8, 1952? A. Yes.

Q. You have had occasion to examine this map or, at least, an exact copy of it in my office, have you not? [426] A. Yes.

Q. When I was discussing with you what you knew about this case, if anything? A. Yes.

Q. Your answer is——? A. Yes.

Q. Now, are you able to come down and indicate to the Court, counsel and the jury where your home was on March 8, 1952? A. Move down?

(Testimony of Evelyn Nurre.)

Q. Yes, please.

(Witness goes to Exhibit 1.)

A. Down this road.

Q. Now, when you say "down this road," we will call that Nurre Road, then, is that right, for identification? Nurre Road. In other words, if you were going to Ellensburg from out to your place, you travel this road (indicating)?

A. Yes.

Q. Now, how far is your home located from this crossing? A. About a half a mile.

Q. Half a mile. You can't see the crossing from your home, can you? A. No.

Q. You are a half a mile in what direction, now? You have [427] in mind this direction, see, this is north that way (indicating)?

A. Well, my road goes right along the Milwaukee for half a mile and then turns into my yard.

Q. You say it is a half mile?

A. About half a mile.

Q. All right, now, I think you may take your seat, Mrs. Nurre.

Do you have a farm or ranch, or is it a home, or what? A. Small dairy farm.

Q. Small dairy farm? A. It was.

Q. Are you living at the same place now that you lived on March 8th, '52? A. Yes.

Q. And how long before March of 1952 did you live there?

A. Well, it will be seven years this April.

(Testimony of Evelyn Nurre.)

Q. So you have lived there, then, about five years before the accident? A. About.

Q. Four or five, anyway? A. Four.

Q. And have you had occasion, I assume you have, to go over that crossing? [428] A. Yes.

Q. Many times before this accident?

A. Yes.

Q. In the car? A. Yes.

Q. And you are familiar with the fact that this is the main line of the Northern Pacific?

A. Yes.

Q. Now, where were you on the date of this accident? A. In my yard.

Q. By the way, at that time were you acquainted with Mr. and Mrs. Everett?

A. Very slightly.

Q. You knew who they were?

A. Yes, by sight.

Q. You know that they had this lovely young daughter Erna? A. Yes.

Q. Was your attention in any manner directed to anything unusual up at that crossing? You can answer that yes or no. A. Yes.

Q. And what attracted your attention?

A. The noise, the tooting of the train.

Q. Of this passenger train? A. Yes. [429]

Q. Now, just tell the Court and jury generally what whistle signals, if any, you heard on that date.

A. It wasn't exactly a signal, it was just a screaming of the whistle.

(Testimony of Evelyn Nurre.)

Q. And is that what caused you to go up to the crossing?

A. I went up on the Milwaukee first to look and see what the trouble was.

Q. Well, you heard these whistle signals on dates prior to this accident? A. Yes.

Q. These whistle signals that you heard on that date, were they the same or partly the same and partly different from what you ordinarily heard in the past?

A. I don't remember whether I heard the regular whistle for a crossing. I heard the unusual whistling, what drew my attention was the unusual whistling.

Q. And describe that.

A. Well, it was just a series of whistles, not like their usual signal. It was several whistles, I don't know how many.

Q. Plainly audible to you, were they?

A. Very plainly.

Q. I assume you don't know the location of the train when you heard these whistles, do you?

A. No. [430]

Q. Did you go up to the scene of the accident?

A. Yes.

Q. Did you go up to the crossing itself?

A. We drove out our lane and down that other lane that goes west. We didn't go across the crossing.

Q. You didn't go across the crossing?

A. No.

(Testimony of Evelyn Nurre.)

Q. Well, did you go up to the front end of the train or any portion of it?

A. Yes, drove up to the front end.

Q. I assume that by the time you got there, her body had been removed, had it? A. Yes.

Q. Have you driven an automobile over that crossing prior to this time? A. Yes.

Q. With reference to March 8, 1952, had you driven it over immediately prior to that time, the car? A. I'm not sure.

Q. Whether you drove an automobile over it before March of 1952?

A. I most undoubtedly drove it early that year, but I don't remember just how soon before the accident.

Q. Oh, you don't recall when you may have gone over it before the date of the accident? [431]

A. No.

Q. When you have to go to Ellensburg, you have to go over this crossing, do you not? A. Yes.

Q. Well, can you tell me approximately from the average, we'll say, whether it is once a week or more or less, that you go over that crossing prior to March 8, 1952?

A. On an average, I go over about once a day, but that isn't clear to Ellensburg, just either to the highway, to the school bus.

Q. Well, that is what I am talking about. You average once a day going over that crossing prior to March 8, '52? A. Yes.

Q. What would be the reason for that?

(Testimony of Evelyn Nurre.)

A. Taking my children to the school bus or picking them up at night or the mail box.

Q. Oh, I see. Well, then, is it reasonable to assume that you might have been over that crossing the day before the accident, which was a Friday?

A. It is possible.

Q. Were your children going to school at that time? A. Yes.

Q. What have you to say, based on your knowledge of the conditions of that crossing and your travel over it, [432] what have you to say as to its travel condition, whether it was difficult to negotiate or hard to negotiate or easy to negotiate, or what?

Mr. Etter: I will object to that. She can describe the condition of the crossing. I think it is up to the jury to determine otherwise, your Honor.

The Court: Yes, I think she should describe the condition.

Q. (By Mr. McKevitt): All right, you describe the condition of the crossing as your recollection of it was immediately before this accident, having in mind, now, the planking area between the rails and the planking on either side of the rails on the outside?

A. Well, I never took a close look at it to know just how much dirt was away from the planks, but, in my opinion, I don't consider it a good crossing and I don't consider it a really bad crossing. It is just an average crossing.

Q. An average country crossing, is that what you would call it?

(Testimony of Evelyn Nurre.)

A. That is what I would call it.

Q. Did you go up to the crossing where these people were congregated, this group that we were talking about, Mrs. Nurre? A. No. [433]

Mr. McKevitt: You may examine.

Cross Examination

Q. (By Mr. Etter): Mrs. Nurre, you undoubtedly drove over the crossing at different times, as I gather from your testimony? A. Yes.

Q. That is, before March the 8th. At that time, that is, prior to March the 8th, Mr. Nurre was using the car in his work, wasn't he?

A. We have a truck and a car.

Q. Oh, I see.

A. And when I need the car, I have the car and he takes his truck.

Q. I see.

A. But he don't hold a steady job.

Q. I see. I was talking about just before March the 8th of 1952. Did you have both of those cars then? A. Well, we drove up in our car.

Q. Beg your pardon?

A. We had our car at the house that day.

Q. Yes. Well, I mean prior to March the 8th of 1952, for some months prior, did you have both the car and another vehicle? I'm not talking about now, I'm talking about back then? [434]

A. You mean have we always had those two?

Q. Yes?

A. From the time we moved on the place.

(Testimony of Evelyn Nurre.)

Q. And you have always had the two and used them? A. We have a truck and car.

Q. And used them? A. And used them.

Q. Fine. Now, the approach that you make to the crossing is from a different directional approach than that made on the highway that constitutes—or the road that runs past the Everett house and the Klocke house, is that right? A. Yes.

Q. And am I correct in saying that as you come down to go across the crossing, your approach as you come onto the crossing is almost a direct right angle approach?

A. Right straight to the crossing? No, it is this way (indicating).

Q. Beg pardon?

A. You slant this way, like they slant that way, to the railroad crossing.

Q. When you come onto the crossing?

A. Yes.

Q. In other words, you drive on the right side of the crossing, is that correct? [435]

A. It comes up to the crossing at a slant.

Q. This scale as it is marked here, Mrs. Nurre, is indicated 20 feet to the inch, and when you come up on the right side of the highway, do you go across it at a slant, or do you go across it more straight than coming up around this way (indicating)?

A. I would say I go across at a little slant.

Q. A little slant, but what I am getting at, you

(Testimony of Evelyn Nurre.)

drive on the right side of your highway, is that correct, on the right side of this highway?

A. Right side of my lane?

Q. Yes, you drive in your right lane, do you not?

A. There is only—it is only one car width.

Q. Yes. And when you come up to the crossing thuswise, you have an area——

A. Not that much of an area, no.

Q. Beg your pardon? You don't have that much of an area? A. No.

Q. Well, this road that comes up from the Everetts, is that the same width as your road?

A. Ours is smaller.

Q. Yours is smaller. About half as large, would you say? A. Yes, it is a private lane.

Q. It is a private lane. But you don't think there is this much room up here as you come onto the crossing? [436]

A. No, not enough to get up on the tracks, straight to the tracks, no.

Q. I see. Does your car come on there at the same angle as the Everett car? I mean, the opposite way, but about the same degree of angle?

A. I wouldn't say it was quite as much of a slant as theirs.

Q. Not quite as much, is that right?

A. No, I don't think so.

Q. And isn't it a fact now that there is a new portion of highway, following my finger (indicating), that has been built this way and down that way? A. Yes.

(Testimony of Evelyn Nurre.)

Q. Is that correct? A. Yes.

Q. Showing you this exhibit, which is the Defendant's Exhibit marked 31, Mrs. Nurre, will you examine that for a moment, please?

Is that a fairly accurate representation of the crossing area? A. Yes.

Q. And could you tell me there about where it would appear on the first picture of the panoramic view, where your road comes into that?

A. Right here (indicating). [437]

Q. Beg your pardon? A. Right there.

Q. Is that where your road comes in?

A. Uh-huh.

Q. And turns onto the crossing?

A. Yes, right straight up right there to the crossing.

Q. All right, thank you. In other words, it is that open space just beyond the telephone pole that appears on the left? A. Yes.

Q. Now, showing you the Defendant's Exhibit No. 30, Mrs. Nurre, just examine it for just a moment so you can acquaint yourself with the view. It is a panoramic view, see. A. Uh-huh.

Q. Coming from the crossing in this direction up to the overpass.

Could you tell me whether you see any portion there of the road that goes toward your place?

A. This one right here (indicating).

Q. That one right there. In other words, that is off to the far left, is it not, of the first panoramic picture on Exhibit 30? A. Yes.

(Testimony of Evelyn Nurre.)

Q. This is Exhibit 30. [438]

A. There is two roads.

Q. There is two roads, one of them goes directly parallel to the railroad track and the other one goes back in the direction indicated on the chart?

A. Yes.

Q. That's fine. Now, do you notice in this picture the condition of the planking and the roadway over to the right side of the picture? A. Yes.

Q. Is there some difference between that and the condition over on the other side where you come onto the highway? A. Yes.

Q. And what is the difference, if you will tell the jury?

A. The gravel has been knocked away from this side.

Q. From that side. And over on this side?

A. It is practically level.

Q. It is practically grade level?

A. Uh-huh.

Q. That is the approach that you have?

A. Yes.

Q. Isn't that correct? A. Yes.

Mr. Etter: That is all, thank you. [439]

Redirect Examination

Q. (By Mr. McKevitt): The knocking away of that gravel, state whether or not it is a fact that at that time of year, trucks going over there will continually break that gravel down; isn't that correct? A. Yes.

(Testimony of Evelyn Nurre.)

Mr. McKevitt: That is all.

The Court: Any other questions?

Mr. Etter: No questions, your Honor.

Mr. McKevitt: Can Mrs. Nurre be excused?

Mr. Etter: Yes.

(Witness excused.)

Mr. McKevitt: I would like to call Mr. Scobee for a few questions.

FRANCIS WILLIAM SCOBEE

called as a witness on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. McKevitt): You are the engineer who was in charge of this train on that date and you have already been sworn to testify? [440]

A. Yes, sir.

Q. Mr. Scobee, you observed Mr. Everett in the courtroom and do you recall him now? Do you recall seeing that gentleman on the day of this accident immediately following? A. Yes, sir.

Q. Keep your voice up, please. A. Yes.

Q. Where? A. Right after the accident.

Q. And did you have a conversation with him?

A. Yes, he mentioned something and I seen somebody nod their head to me and he come over and started talking to me.

Q. What was the conversation?

A. Well, the first thing he did, he said——

(Testimony of Francis William Scobee.)

Mr. Connelly: May I interrupt and ask who the conversation was with?

Mr. McKevitt: Mr. Everett.

A. Mr. Everett.

Mr. Connelly: Thank you.

A. Mr. Everett said, to my best recollection, at that time, "I told her, 'Watch out for that passenger train;' that it hadn't come yet when she asked me to use the truck." And he says, "Then shortly afterwards," [441] he says: "I heard the train whistle," then he says, "short blasts," and he says, "That is when I knew there was something wrong."

Q. (By Mr. McKevitt): Now, in connection with the latter statement, did he state anything as to what experience he had had in the past with hearing whistle signals of that character or something like that?

A. Well, something about—now it is a little vague—but he said, mentioned something about short blasts of a whistle was a kind of warning that farmers had had that livestock or something on the track. It was something to that effect.

Q. Well, was his attitude toward you on that date one which in any wise indicated that he felt that you had done something you shouldn't have done or failed to do something you should have done?

Mr. Etter: Object to that.

The Court: Sustain the objection to that as to what his attitude was.

Q. (By Mr. McKevitt): Did he ask you at that

(Testimony of Francis William Scobee.)

time as to whether or not you had sounded the whistle signals?

Mr. Etter: Just a minute, I am going to object. They are all leading. If counsel wants to ask about a conversation, that's all right. I will object on that ground. If he wants to talk about a conversation, that's fine. [442]

The Court: Yes, I think you should ask what his conversation was.

Q. (By Mr. McKevitt): Well, have you covered now in its entirety, so far as you recall, the conversation you had with Mr. Everett?

A. That is about it, yes.

Q. All right.

A. As far as I can remember.

Q. Now, I believe you testified yesterday as to your previous experience in operating a passenger train over that area? A. Yes, sir.

Q. And how many times did you say you had operated this same train over that area before the accident?

A. Well, this specific train about 12 or 15 times, something like that.

Q. As an engineer? A. Yes, sir.

Q. Had you ever been on it in the capacity of a fireman? A. Yes.

Q. And over what period of time?

A. This specific train, I fired that passenger job for about a year.

Q. About a year prior to the accident?

A. Prior to my engineer's seniority. Oh, it is

(Testimony of Francis William Scobee.)

about a [443] year. Sometimes it varies and you catch them jobs off the extra board, too, as a fireman.

Q. When you speak of the extra board, you are referring now to what is connected with seniority in railroad?

A. That's right. The younger you are in your capacity as a fireman or engineer, you work the extra board. You haven't the seniority to hold a regular job, in other words.

Q. The younger you are, the more you get bumped by an older engineer in point of seniority, is that what you mean? A. That's right.

Q. Now, for the purpose of defendant's case, when, if at all, did you begin sounding of the whistle as you approached that crossing?

A. Immediately at the whistle post or close thereafter.

Q. And the whistle post is shown in some of these photographs here in evidence, is it not?

A. Yes, it is.

Q. And what was the standard crossing whistle used by the Northern Pacific Railway Company at that time and prior thereto?

A. Over all crossings, it is two longs, a short and a long, and the long blast will be carried over the crossing. [444]

Q. The last long blast has to be carried over the crossing? A. That's right.

Q. Now, what portion of that signal did you give on that date?

(Testimony of Francis William Scobee.)

A. I only got to sound two whistles that I can recall, and that was immediately after passing the whistle post. I sounded one long whistle, then a small pause, and then another long whistle, and then this truck, the top of this truck came into view around the pillars of the Milwaukee viaduct.

Q. Well, that is the pillars of the Milwaukee viaduct that you went under?

A. I hadn't got to the Milwaukee viaduct yet.

Q. When you say this truck came under what, the Milwaukee viaduct?

A. Came into view to my left.

Q. Oh, to your left?

A. Came into view to my left from my point of view on my engine, to the left of the Milwaukee pillars that are up against our rail.

Q. I see.

A. On the left-hand side.

Q. At the time when you first saw the truck, did you estimate yesterday—I think you did—the distance you [445] believed it was from the crossing?

A. I can't pin point any distance.

Q. Well, we are not asking you to pin point, Frank. You are entitled——

A. I hadn't arrived at the viaduct quite yet when the truck came into view.

Q. Well, but what I am getting at is this: How far, in your present opinion, was the truck from the crossing when you first saw it?

A. Well, the truck, I would estimate about 25 feet.

(Testimony of Francis William Scobee.)

Q. Yes. And when you first saw it, it was moving, was it; is that your testimony?

A. It was moving.

Q. And what did you estimate its rate of speed to have been?

A. Well, it was a slow speed, I couldn't say how fast, but it was a slow speed.

Q. Was it 10 miles an hour or less?

A. I imagine it was 10 miles or less.

Q. 10 miles or less. Now, as it approached that crossing, did it continue at that rate of speed or any rate of speed, or did it come to a stop, or what did it do?

A. It came to a kind of a stop at the crossing.

Q. And at the time it came to a stop, was any portion of the truck on that crossing? [446]

A. No, it was clear of the crossing.

Q. When you first saw it approaching the crossing at this 25 foot distance, what, if anything, did you do with reference to your brakes?

A. I set the brakes.

Q. Well, in what manner, what kind of an application was it?

A. I never looked to see how much application I made, I just made an application of the brakes.

Q. Well, what do you call it? Was it dynamiting or service application?

A. No, a service application.

Q. All right. And then after this truck came to a stop, what, if anything, did you do? Did you release the brakes? A. I released the brakes.

(Testimony of Francis William Scobee.)

Q. That, if I understand, would enable you to regain speed? A. Regain speed, yes.

Q. Now, what is the next thing you did, if anything, with reference to braking?

A. Well, when I seen this truck in a bucking motion start up on the crossing, well, all I had left to do was start shutting my throttle off and grab a dynamite.

Q. When the truck started this bucking motion, was it [447] still clear of the crossing or was it on the crossing?

A. It was bucking up on the crossing.

Q. It was bucking up onto the crossing. All right. And then is that when you dynamited?

A. Close after that.

Q. Now——

A. There is things that I have got to go through.

Q. All right. A. Takes a little time.

Q. Let's get at that right now. By the way, in that train at that time, you are sitting right up in the front, are you not? A. Yes, sir.

Q. You and the fireman? A. Yes, sir.

Q. A speedometer on the train?

A. Yes, sir.

Q. Where is that speedometer located?

A. Down and to my left.

Q. Down to your left. Now, what instruments or mechanical devices are there there that have to do with the operation of that train by you?

A. I have my throttle stand to my left and down.

Q. All right. A. Throttle stand. [448]

(Testimony of Francis William Scobee.)

Q. Your throttle stand to your left and down?

A. That's right.

Q. What is the purpose of the throttle?

A. That is to run my locomotive to pull the train with.

Q. To keep it going? A. Yes, sir.

Q. Does it have anything to do with increasing or decreasing of speed?

A. Yes, you have throttle notches on there. You start from idle position, 1 to 3, right up to 8 position.

Q. All right, that is one gadget, we'll call it. What is the other one you have to use?

A. You have your automatic brake valve.

Q. Where is your automatic brake valve?

A. That is up in the right-hand corner on my right.

Q. What else do you have?

A. And you have your independent brake valve.

Q. Now, you stated that you gave the two long blasts; you didn't get into the short and the long, did you? A. No.

Q. And that is when you decided to dynamite the train, was it?

A. No, that is when I made an application of the brakes, when this truck appeared into my view to my left.

Q. That is the first time—— [449]

A. I had to let go of the whistle to get down and start figuring I might be in an emergency, started shutting the throttle off and I set the air

(Testimony of Francis William Scobee.)

with my right hand, so I had to let go of the whistle.

Q. Then what different maneuvers did you go through there from the time you saw this truck until you ceased making maneuvers?

A. Well, I have to pull the whistle with my left hand.

Q. Go ahead.

A. I had to drop—come down to the throttle and come up here with my right hand for air (indicating). That is my train line air for my train.

Q. After you make the dynamite, is that a full application?

A. A dynamite is when you have dumped all the air.

Q. Dump all your air? A. That's right.

Q. And then that's all you can do?

A. That's all, you just sit there.

Q. And pray? A. That's right.

Q. By the way, what is the fact as to whether or not in connection with mile posts in that area, that Ellensburg is Mile Post 0; is that correct?

A. Mile Post 0 at the depot, yes. [450]

Q. Mile Post 0 at the depot. With reference to the speed tape, was there a speed tape on that engine on that date, that Diesel? A. Yes, sir.

Q. Do you know where that speed tape is located?

A. Right in behind the speedometer, locked up.

Q. Do you have anything to do with putting it in or taking it out?

A. Can't touch it, it is locked.

(Testimony of Francis William Scobee.)

Q. Did you ever have any keys to it?

A. No, sir.

Q. Mr. Scobee, I don't recall yesterday whether you were asked about your maximum speed as you approached that crossing and before you had any knowledge of this truck.

A. Well, the maximum speed in that district was 70 miles an hour.

Q. You were permitted 70? A. Yes, sir.

Q. Well, do you recall, have you any independent recollection, what your maximum speed was as you approached the overpass of the Milwaukee?

A. Well, sir, the last time I looked was approaching the whistle post, was 60 miles an hour, and after leaving there I had to set this air and release, everything was [451] attention on this truck, so I didn't look again.

Q. In other words, the speed tape itself would indicate?

A. The speed tape is the only thing I could go by when I got in.

Mr. McKevitt: That is all.

Cross Examination

Q. (By Mr. Etter): Mr. Scobee, didn't you testify here yesterday under my examination that your train reached a speed of 64 miles an hour?

A. You asked me what the tape showed, I think, sir, didn't you?

Q. I asked you what speed you were going?

A. I believe you asked me what my last speed

(Testimony of Francis William Scobee.)

was that I remember, and I think I said that the last time I recollect was at the whistle post at 60 miles an hour.

Q. Well, where were you going 64 miles an hour?

A. Well, as far as I knew was what the tape showed when I got into the office in Seattle when they took the tape out.

Q. At what?

A. The highest speed I went was 64 miles an hour.

Q. Where? A. Around the viaduct. [452]

Q. Beg your pardon?

A. Around the viaduct and immediately before I dynamited the train.

Q. In other words, just near the viaduct you were going 64 miles an hour? A. Yes, sir.

Q. Beg your pardon?

A. Yes, sir, right around that vicinity. I never scaled it out, all I know is what the tape showed, and my maximum speed in the whole distance between Ellensburg and there was 64 miles an hour.

Q. Well, you say that at the whistle post you were going 60? A. Yes, sir.

Q. Beg your pardon? A. Yes, sir.

Q. And at the viaduct, just before the viaduct, 64? A. Yes, sir.

Q. Is that correct?

A. Some place around in there.

Q. You picked up, then, 4 miles of speed in approximately 520 feet or before that, is that correct?

(Testimony of Francis William Scobee.)

A. Could be right around in there, yes. I never pin pointed on it down.

Q. Beg your pardon? [453]

A. I couldn't pin point on it down; all I know my speed tape showed the maximum speed before the accident was 64 miles an hour.

Q. 64 miles an hour? A. Yes.

Q. And that was just at the crossing the overpass?

A. Right around the viaduct or there close to it.

Q. But you looked yourself at the whistle post and it was 60 then?

A. It was right around the vicinity of 60 miles an hour, yes.

Q. I see. When previous to the time that you looked at it at the whistle post had you observed your speed?

A. Before I reached the speed of 60?

Q. Yes?

A. Well, I had a slow order two miles out of Ellensburg.

Q. Yes?

A. Of 35 miles an hour over a bridge.

Q. That's correct.

A. And I carried that speed, oh, about a quarter of a mile until I got the rear end of my train over it, then I increased my speed.

Q. In other words, when you got out of the slow zone of two miles, you would still have about

(Testimony of Francis William Scobee.)

two miles more to go to get to the crossing? [454]

A. And I started picking up my speed again.

Q. You started picking up your speed?

A. Yes.

Q. When did you pick it up to 50 miles an hour?

A. I couldn't tell you unless I had the tape. There is an area in there, you check your speed as you are going along, but to pick out a certain area where you are doing it, I couldn't tell you that.

Q. Am I correct in assuming, then, that the only recollection that you have here on the manner of your miles per hour is this: That you kept your mileage per hour under 35——

A. Over this bridge.

Q. You went in and came out of the speed zone at 35 miles an hour, and then for the next stretch of approximately two miles you can only be sure of two particular points of your speed—one at the whistle post, when you saw that it was 60 miles an hour, and the other when the tape was examined which showed you going 64 miles an hour just before you got to the underpass—are the only two you recall now?

A. Well, sir, you can't run a locomotive and watch ahead of you and keep your eye glued to the speedometer, either.

Q. I am asking—— [455]

Mr. McKevitt: Go ahead.

Mr. Etter: Just a minute——

Mr. McKevitt: He hasn't finished his answer.

Mr. Etter: He isn't answering my question. I

(Testimony of Francis William Scobee.)

am not asking for an explanation, if he cares to give it, I am asking if he didn't——

The Court: What was the question?

(The question was read.)

The Court: Do you understand the question?

A. Yes, sir.

The Court: All right, you may answer.

A. In running a locomotive and running it over a period——

Mr. Etter: That is not responsive.

The Court: Counsel is entitled to have an answer. Then Mr. McKevitt can bring out the explanation.

Mr. McKevitt: If that is the fact, answer yes; if it isn't, answer no.

A. Yes, I guess. Three years ago.

Q. (By Mr. Etter): All right. I think your testimony was, too, under examination by Mr. McKevitt, that on this particular day, I think your statement was to this effect: Immediately or close thereafter, referring to the time you first blew a whistle, you were referring to the whistle post, am I correct?

A. Immediately around the vicinity or there close after. [456]

Q. Or close thereafter, that is a fair, correct statement?

A. Started to blow my first whistle, yes.

Q. And your signal was two longs, a short, and then a long that you carry across the crossing?

A. That——

(Testimony of Francis William Scobee.)

Q. I mean, that is ordinarily your rule?

A. That is the rule for the crossing whistle.

Q. Rule for the crossing whistle. On this date, as I understand, the only whistling from your locomotive was the first two longs? A. That's right.

Q. Beg your pardon?

A. That's right, that's all I blew.

Q. I see, and that's all that you blew. Then when was the next whistle blown that you heard?

A. Immediately after it showed that this truck was going on the crossing, my fireman jumped up——

Q. When was that?

A. Immediately when I had seen an emergency with this truck coming up, I had to let go of the whistle and go down for my air. I had already set the application and released it.

Mr. McKevitt: You are talking too fast, I can't follow you.

A. When the truck momentarily stopped, I released the air [457] and reached up for the whistle again, and the truck started picking up onto the track, so I had to go for my throttle and my brake again, and the fireman, he jumped up and started tooting the whistle.

Q. (By Mr. Etter): If I understand——

A. That was immediately after going under the viaduct or right around in there some place.

Q. If I understand you correctly, then, what you did, you gave two longs—— A. Yes, sir.

Q. And then you reached for your air, is that correct? A. My throttle and my air.

(Testimony of Francis William Scobee.)

Q. Your throttle and your air?

A. My throttle is down here and my air is up here (indicating).

Q. That's correct. What did you do at that time, how much air? Did you give a service application?

A. A service application, the amount I don't know.

Q. That was before you were under the viaduct?

A. It was to slow down the train, anyway.

Q. That was before you were under the viaduct?

A. Before I reached under the viaduct, approaching to it.

Q. Then when did you release the service application?

A. Well, it was around the viaduct there some place.

Q. Around the viaduct. And then did you reach up after [458] you released it and continue your whistling?

A. I reached up to start the whistle again. After setting the air brake back to running position with my right hand and putting my left hand down to the throttle again, I reached up to start the whistle again when the emergency come up with the girl going onto the track, and I had to start over the procedure again, and the fireman in the meantime had jumped up and started tooting the whistle in a frantic way to try to get him off the track.

Q. Do you know how many times he tooted it?

A. I couldn't tell you. It was one of those moments where everything was quick and I couldn't

(Testimony of Francis William Scobee.)

tell you how many times. I know he blew the whistle, but how many times, I don't know.

Q. All right. So if we have it right, that there were two long blasts blown at the whistle stop and before you got to the viaduct?

A. Before I got to the viaduct, yes.

Q. All right. Now, do you recall when it was or where you were, can you give an approximation of where you were from the crossing, the grade crossing, when the emergency arose and the fireman jumped up and started to pull the whistle and you pulled off or pushed off the throttle, I guess it is, and pulled on your brake? [459]

A. To tell just exactly where I was at, I can't tell you. When an object like that comes on there, you don't look to the side or get any idea where you are, you have just got your eyes pin pointed on this one object. And it was in the vicinity of the viaduct or close after, but I couldn't pin point the footage or anything like that, because all I know, I had my eyes on that object, and that's all I can tell you.

Q. This car that you saw down there, the emergency, did it drive right out on the track?

A. No, it bucked its way onto the track.

Q. How far did it buck?

A. It got the front wheels on one rail and the hind wheels on the other rail.

Q. From a distance of how far back, in other words, south of that point?

A. It was clear of the outside rail when it first paused at the track.

(Testimony of Francis William Scobee.)

Q. It was clear of the outside rail. By that you mean it was clear of the rail——

A. On the south side.

Q. Rail indicated as south? A. Yes.

Q. How much was it clear of that rail?

A. In footage, I couldn't say. Eight foot would clear, [460] 10 foot would clear, but I couldn't tell you in footage just how far it was away.

Q. Well, it was more than a foot of six inches, something like that? A. Yes.

Q. I mean, a recognizeable——

A. It was recognizeable to me that it was clear.

Q. And you saw it buck, is that right?

A. You could see it in a jerking motion coming up on the track.

Q. You could see it in a jerking motion coming up on the track. And it was that position, then, it was that you gave an emergency, is that right?

A. It was right around the viaduct there some place.

Q. Around the viaduct?

A. Right around the viaduct. In footage, I don't know how far I was from the crossing.

Q. Well, as you got to the viaduct, it is my understanding that you gave a service application and you had to go through all of these motions of release?

A. This was approaching the viaduct.

Q. Beg your pardon?

A. This was approaching the viaduct that I set this air.

(Testimony of Francis William Scobee.)

Q. Well, approaching the viaduct.

A. And I was releasing it, probably, you would say, going under the viaduct there, close to. [461]

Q. All right. Approaching the viaduct and when you got to the whistle post, you were then, in accord with Mr. Adams' statement, who was your engineer, you were then approximately a distance of 500—he said it was 687 feet from the middle of the viaduct to the crossing, the grade crossing, Mr. Adams testified.

A. I understood him to say something like that.

Q. And he also indicated that the whistle post was 1,323 feet east of the crossing, which, of course, would make the whistle post 636 feet east of the viaduct, middle of the viaduct, is that correct?

A. That should be.

Q. All right. Now, you said that you pulled your whistle at or about the place where the mile post or where the whistle post was indicated by the side of the track as indicated in the pictures?

A. Yes, sir.

Q. That is correct. That you only had an opportunity to pull, I think it was two longs?

A. Two long whistles is all I can recall pulling myself.

Q. And your testimony was the other day that your long whistles were about two seconds with about a two second pause in between?

A. Around that, it is pretty hard to tell just by seconds [462] when you pull a whistle. I don't

(Testimony of Francis William Scobee.)

count or nothing when I am pulling on the whistle. I pull a long and I don't count.

Q. You say you are not sure; would you say your long whistle is longer than two seconds or shorter than two seconds?

A. Sometimes you carry them longer and sometimes you carry them shorter.

Q. Do you say that you carry a long whistle shorter than two seconds and call it a long whistle?

A. No, a long one has got to be carried two seconds or better.

Q. Two seconds or better? A. Yes.

Q. Well, then, it is certain that you carried it two seconds or better, isn't that right?

A. That's right, but to tell you how much more than that, I couldn't tell you.

Q. I thought you were definite yesterday about two seconds.

A. Didn't I explain I believed it was two seconds, but I didn't know how much more.

Q. Well, would it be three seconds?

A. You can't tell, some things is habit to you, you don't count the time you are holding that down. You just hold it long enough you know it is a long whistle, you [463] don't count how long you are holding it.

Q. Well, at least on your testimony yesterday of two seconds per long blast and two seconds for pause——

A. At least two seconds.

(Testimony of Francis William Scobee.)

Q. At least two seconds, on your testimony yesterday, you were traveling then at 60 miles an hour, you have testified? A. Yes, sir.

Q. So you are going 88 feet a second?

A. About that.

Q. Consequently, if you assume that you were giving the two second long and two second pause and two second long, you would have gone 528 feet in a westerly direction at 60 miles an hour from the whistle post toward the overcrossing; am I correct?

Mr. McKevitt: I object to this as being argumentative, if your Honor please.

Mr. Etter: Why is it argumentative? It is a mathematical certainty on his own testimony.

Mr. McKevitt: Well, then, if it is a mathematical certainty, there is no need of asking him the question.

Mr. Etter: Well, I have a right to inquire about it, if he recognizes it. This isn't argumentative; he set the basis.

The Court: Well, go ahead. [464]

Q. (By Mr. Etter): Wasn't your testimony yesterday two seconds?

A. Around there or better.

Q. And isn't it your testimony that you were going 60 miles an hour?

A. About the whistling post, I was going 60. That is about the last time I looked, around the whistling post.

Q. And do you agree with me that if you are

(Testimony of Francis William Scobee.)

going 60 miles an hour, you are covering or you are going 88 feet per second?

A. According to that speed, yes.

Q. That's right. So that in six seconds, you would be going 88 feet times six, isn't that right?

A. Around there.

Q. Or 528 feet, is that right?

A. Right around there, yes.

Q. All right, so on your testimony yesterday, if you gave these two long blasts, with a pause in between of the two-second interval, from the time that you started this whistling at the whistle post here, you went a distance of 528 feet here (indicating), or at that time, in accord with Mr. Adams' testimony, you were in excess of 100 feet east of the intersection when you made your service application of air?

Mr. McKevitt: I object to this as being argumentative. [465]

Q. (By Mr. Etter): Would that be correct?

Mr. McKevitt: I object to that as being argumentative.

Mr. Etter: It is cross-examination.

Mr. McKevitt: No, it is an argument, it isn't cross-examination.

The Court: Well, he may answer.

Q. (By Mr. Etter): Based on your testimony yesterday with regard to the length of time for your whistles and on your testimony of today as to speed, upon the engineer's testimony as to the distances, at the conclusion of your long, a pause and your

(Testimony of Francis William Scobee.)

long, you would still be over 100 feet east of the Milwaukee overpass, isn't that correct?

A. Yes, sir, and I had to let go of the whistle and start for that service application, and how long I carried that service application and released it, I don't know how long that was in seconds or anything like that, except that I had released the air when I seen the truck momentarily stop when I approached the viaduct.

Q. So you were actually making a service application of the air, not under the overpass or beyond, but 100 feet east of it, isn't that correct?

A. It would be beyond it, yes.

Q. Yes. Handing you the Plaintiff's Exhibit 26—— [466]

The Clerk: That is Defendant's.

Q. (By Mr. Etter): Pardon me, Defendant's 26—which is a picture looking west in the direction in which you were going, taken from 700 feet east of the crossing, as your counsel indicated. As Mr. Adams testified, the middle of the viaduct was 687 feet east of the crossing, so that, give or take 13 feet, is about midway?

A. I believe I could see the truck before——

Q. About midway?

Mr. McKevitt: Keep your voice up so we can hear.

A. I believe I could see the truck before I got there.

Q. (By Mr. Etter): That's right.

A. It seems a little closer to me and this picture

(Testimony of Francis William Scobee.)

seems a little closer to me than what I could see from back here, because I am sitting up higher, I am sitting up quite a bit higher than that.

Q. That's right, you had a better view.

A. So I can see to my left a little over by this Milwaukee viaduct. I don't know just exactly the height the cab sits up, but it is quite a bit higher than this picture was taken. So I can't tell whether this is putting me closer or putting me farther back, I can't tell.

Q. I see. Well, here is one taken 900 feet east of the crossing facing west. Would that be closer to it?

A. Yes, that is a little more closer to what the truck [467] appeared from out of the left behind this pillar here (indicating), going in the direction like this and then turning up to the track.

Q. This is 27, No. 27, Defendant's 27.

A. I can't tell just exactly.

Q. Where was it you first saw the truck?

A. I first saw the truck as it approached from behind here (indicating).

Q. From behind where?

A. The top of the truck come out from behind here.

Q. From behind here?

A. There is a cement pillar there.

Mr. Etter: All right, may I have your pen, Mr. Taylor? Excuse me, Mr. McKevitt.

Q. On this picture of 900 feet, would you mind

(Testimony of Francis William Scobee.)

taking this pen, or will you tell me now, you point out where you saw that truck the first time?

A. It is pretty hard to reminisce.

Q. Can you give us an——

A. At first?

Q. All right, at first?

A. That long ago I saw the top of the truck——

Q. Where?

A. As it come from some place.

Q. In here or here or here (indicating)? [468]

A. Well, somewhere in the vicinity in here (indicating), you could see the top of the truck sitting up at the height I was sitting.

Q. All right.

A. See, your camera, somebody standing there on a tripod, where I am sitting up quite a few feet higher, which will let me see better.

Q. All right, right about here (indicating)?

A. Well, right in that vicinity.

Q. You mark it, please, somewhere close to it.

A. Well, I can't pin point it right down because it comes out of there abruptly right there on an angle. It is right around in this vicinity right in here, where I am sitting up higher looking down (indicating).

Q. It is right in this vicinity. All right, will you extend this line out and put your initials out there?

A. Extend what line?

Q. Or extend the line out from this point you have made and put your initials out there?

A. (Witness complies.)

(Testimony of Francis William Scobee.)

Q. And you have put on there "F.W.S."?

A. Yes, sir.

Q. As being the point where you first saw the truck, the top of the truck, is that correct?

A. About the angle I saw. [469]

Q. You saw?

A. I can't tell you in feet, but that is the angle the truck came out into my view.

Q. Into your view, I see. And you were watching it, were you, at the time? A. Yes, sir.

Q. And it was traveling in what direction?

A. Well, kind of at a northerly direction, just about the way the road runs there.

Q. And then when you came under——

A. I figured about 25 feet from the crossing from the time I first saw it until it got to the crossing, I figured about 25 feet.

Q. It had about 25 feet to go?

A. I figured about that, I don't know.

Q. In other words——

A. I never did step it off to see just how much distance I could see.

Q. Of course, I know.

A. But I figured about that distance, I don't know.

Q. In other words, when you were at this crossing (indicating), the automobile was about 25 feet from the crossing?

A. I figure about there, yes, coming up at a slow speed and kind of angling away from me as it ap-

(Testimony of Francis William Scobee.)

proached the [470] crossing, so it is pretty hard to tell how many feet they had to go.

Q. Is that when you made the service application or right after that?

A. Yes, it is, because it is kind of a surprise for somebody to come out from behind there, and you don't know whether they are going to stop, so I made this service application in case they didn't. Of course, when she made that momentary slow down or stop and kind of paused there at the crossing, well, I just released them, just figured it was another one of those things which you run into every day on the road, you have people coming up to the crossing and stopping. You find one that will try to make it.

Q. When did you release the air, release your service application?

A. It was under the viaduct, right around under the viaduct.

Q. Under the viaduct, all right. And how soon right after you released your air did it start bucking?

A. Well, this bucking started right away.

Q. Right away? A. Yes.

Q. In other words, when you came under the viaduct, then you saw the bucking? [471]

A. Yes.

Q. And it was then——

A. Had to go through these quick motions again starting all over.

Q. Quick motions and start all over again?

(Testimony of Francis William Scobee.)

A. I might add, sir, if it is all right with you, that we carry headlights burning on these Diesel locomotives in the daytime, as well as at night, to help warn the people on these highways.

Q. That is an oscillating one, you have two?

A. No, the oscillating one we use at night through the city streets and stuff as that, but we use the headlight in the daytime, as well as at night, but that is just the regular headlight.

Q. The regular headlight. And the car, as I understand it, was approximately from eight to 10 feet south of the rail and this bucking started and it came out on the track? A. Yes, sir.

Q. And did the bucking stop just after it got on the track?

A. It seemed to have stalled right there.

Q. Right there? A. Yes, sir.

Q. And do you recall how far you were away when it appeared to have stalled to you? [472]

A. Well, it appeared to be a little ways, but in footage, I couldn't tell exactly. It is one of those things where you are looking right at an object—

Mr. McKevitt: He is talking about how far away you were away.

A. I couldn't tell how far away I was, because it is just one of those things because you have pin pointed your eyes on the object, it is hard to say, because you haven't looked at your surrounding area or nothing, and moving up at a speed like that, it is just over with pretty quick.

(Testimony of Francis William Scobee.)

Q. (By Mr. Etter): What clothing were you wearing that day?

A. Regular uniform, cap, overalls and jacket.

Q. Were those bib overalls?

A. Yes, sir. And a jacket over them, short jacket.

Q. Jacket. Were those the grey and blue striped one, kind of, or what were they, just the ordinary——

A. I had the——

Q. Beg your pardon?

A. I had the white and blue striped ones, I believe. I don't know what I was wearing three years ago, but——

Q. The point is you had a uniform on that would go on an engineman? A. Yes, like——

Q. Whether it was blue denim or grey or white?

A. It was a regular uniform we always wear.

Q. A pair of overalls?

A. A pair of overalls and a jacket.

Q. Jacket. A. And a cap.

Q. Engineer's cap? A. Yes, sir.

Q. One of those that come with the bill, isn't that right? A. That's right.

Q. And when you stopped the train, or when the train was finally stopped after the collision down the track——

A. Yes, sir.

Q. ——down the track, why, you and the fireman got out of the locomotive, did you?

A. Yes, and inspected the truck on the front end of the engine.

Q. Inspected the truck. Then what did you do?

(Testimony of Francis William Scobee.)

Did you walk back? A. Yes.

Q. To the back of the train. And where did you see Mr. Everett?

A. Shortly after things had calmed down a little bit around there, he showed up. [474]

Q. Where did you first see him?

A. As he approached the crossing, somebody hollered, "Here comes her father."

Q. Somebody hollered what?

A. Somebody hollered, "Here comes her father." There was a lot of people around there at that time.

Q. As he approached—what was that again?

A. He drove up in a car from the same direction the truck came from.

Q. Uh-huh.

A. And jumped out. He was with somebody else and he came running up there.

Q. Where were you at that time?

A. I was standing in the vicinity of where the girl was.

Q. You were standing in the vicinity of where the girl was? A. Yes.

Q. And where was that from the crossing?

A. I believe it was about 75 feet.

Q. About 75 feet from the crossing?

A. About 10 feet off the right of way.

Q. Was it somebody standing where you were that said, "Here comes her father," or was it somebody up at the crossing?

A. There was quite a few milled around in one area. I [475] just heard this out to the side of me,

(Testimony of Francis William Scobee.)

I didn't look to see who said it. Evidently, it must have been a neighbor or somebody that knew him.

Q. Who was around with you there at the time you heard somebody say, "Here comes her father"?

A. Oh, I don't know their names or nothing like that. I am not acquainted in that area, I don't know. Whether my fireman was, I don't know. There was so many people talking. The people started climbing off the train, as well as coming from the highway, because traffic on the highway stopped right now and all the people in the automobiles jumped out and come running over there. It was quite a mixup of people, so it is hard to say who was there and who wasn't.

Q. All right, when somebody said, "Here comes her father," will you tell us what happened?

A. Her father went up and wanted to pick her up.

Q. All right.

A. And the neighbors said—I heard one of the neighbors say, "Well, we'll help out," and I guess it was the coroner and some of the police around there.

Q. One of the neighbors, how do you know it was one of the neighbors?

A. I figured it was one of the neighbors the way they consoled him and everything, they must knew him pretty well. [476] I don't know who they were.

Q. I see. And then will you tell us what occurred, what was said?

(Testimony of Francis William Scobee.)

A. Well, they picked the girl up and put her on a stretcher then.

Q. All right, then what?

A. Then I happened to be walking back down toward the crossing, a little closer to the crossing there, and I seen this fellow nod his head and Mr. Everett come over toward me then and started a conversation, very calm, to me, and I told him I was—how sorry I was that it happened.

Q. Then you two were walking up the track toward the crossing?

A. No, this was at the crossing.

Q. It was at the crossing?

A. See, they had got the girl back, trying to get her to the truck at that time—or the ambulance.

Q. And you were at the crossing, both of you?

A. Right around the crossing there, yes.

Q. Who else was there besides Mr. Everett?

A. I don't know who they are. See, I never got any names of the fellows and they was all strangers to me, and people off the highway and people off of our train, being a passenger train, they all jumped off after the accident. [477]

Q. The two state patrolmen were there first, weren't they, Stanley and Carriger?

A. There were state patrolmen there, yes.

Q. They were standing with you and Mr. Everett?

A. I couldn't tell you whether they were standing there at that time or not.

(Testimony of Francis William Scobee.)

Q. When was it you talked with the state patrolmen, up at the crossing or down at the train?

A. Well, we talked at the crossing there and then they was walking up and down the track.

Q. The state patrolmen? A. Yes, sir.

Q. Now, when you were standing at the crossing, you don't recall who was standing there besides you and Mr. Everett?

A. I don't recall the names or anything like that, no.

Q. I see. And what did you say to Mr. Everett and what did he say to you? I wish you would repeat that, please.

A. Mr. Everett, the closest I can remember it, I noticed this fellow nod to me, see, evidently somebody pointed out that I was the engineer, and Mr. Everett come over and he says, "You the engineer?" and I says, "Yes, I am. Sure sorry this happened." "Well," he says, "I [478] told her to be careful of that train. It hadn't gone yet." And then he says, "I heard the whistle and," and he says, "I heard them short blasts of the whistle, and I knew there was something wrong."

Now, that is as close as I can remember the conversation with Mr. Everett.

Q. What did you say?

A. Feeling sorry, that's about all I could say, sir.

Q. Was that the end of the conversation?

A. Yes, sir.

Q. What did Mr. Everett do then?

A. He had to go back over and talk—he didn't

(Testimony of Francis William Scobee.)

have to, but he did go back and talk to—whether it was his neighbors or who the fellows was. There was a whole bunch around that knew—that appeared to know him, and then there was a coroner, and so on and so forth, around there, deputies.

Q. Did you stay—

A. And the Sheriff and stuff, I guess. There was a lot of fellows around there with badges on, I don't know who they were.

Q. Did you stay on the crossing?

A. Well, I had to go up and direct the wrecker to take this truck off of my engine.

Q. Did you see Mr. Everett again? [479]

A. Never have. This is the first time in this court that I have seen him since.

Q. And you recall that this is the man that you had that conversation with? A. Yes, sir.

Q. Can you tell us how it is that you recall him as you saw him once in 1952? Is there something about him that you can tell us you recall this is the man? A. His face features.

Q. Beg your pardon?

A. His face features.

Q. Anything else?

A. His name is Mr. Everett.

Q. His name. And do you remember what he was wearing that day?

A. Well, I can't recall too much, no.

Q. Beg your pardon?

A. I can't recall too much, no.

(Testimony of Francis William Scobee.)

Q. You can't tell us with any degree of certainty, is that it?

A. Not to a certainty, no.

Q. I see. Mr. Scobee, isn't it a fact the only reason you know this is Mr. Everett is because he was identified before this trial started?

A. No, I can remember his face features, sir.

Q. You can remember his face?

A. Yes, sir. Because this death was a shock to me, too.

Q. Did you see Mr. Klocke when he was here and testified? A. Yes, I saw Mr. Klocke.

Q. Did you remember Mr. Klocke?

A. No, I didn't, never met him before until this trial.

Q. Did you see Mr. John O'Neill testify here today? A. Yes.

Q. Did you remember Mr. O'Neill?

A. No, I didn't remember him.

Q. Did you see Larry O'Neill testify?

A. I saw Larry, yes.

Q. Do you remember seeing Larry at the scene?

A. No, sir.

Q. Do you remember seeing any of the witnesses who testified other than Mr. Everett at that accident?

A. Mr. Everett is the only one that I got to meet and talk with. He is the only one.

Q. He is the only one you got to meet?

A. That is the one I talked to.

Q. I see.

(Testimony of Francis William Scobee.)

A. The police asked me my name; I never asked the police theirs; but that is the only thing that I got to find out who he is and anything about him was just Mr. Everett come up and asked me if I was the engineer and [481] he said he was the father, and that's all there was to that. As far as knowing anybody else, I didn't know anybody in that vicinity.

Mr. Etter: That is all, your Honor.

The Court: Any other questions?

Mr. McKevitt: Just one or two questions, your Honor.

Redirect Examination

Q. (By Mr. McKevitt): You said something about seeing a state patrolman walking up and down the track, is that correct? Did you walk up and down the track with any state patrolman?

A. A state officer walked up and down the tracks. I figured I had to have permission to take the truck off my engine. I am responsible for the engine when I am out there, but, yet, when accidents happen, you have got to have authority to move that vehicle off your engine, which it was stuck pretty tight to my engine, and I had to get a wrecker from Ellensburg to come out and take the automobile off.

Mr. McKevitt: That is all.

The Court: Is that all of this witness?

Mr. Etter: That is all.

(Witness excused.)

The Court: It is time for the afternoon recess.
Court will recess for 10 minutes.

(Whereupon, a short recess was taken.)

Mr. McKevitt: May I proceed, your Honor?

The Court: Yes.

Mr. McKevitt: Mr. Williams.

HARVEY GLENN WILLIAMS,

called and sworn as a witness on behalf of the defendant, was examined and testified as follows:

Direct Examination

Q. (By Mr. McKevitt): Will you state your name to the Court and jury and counsel, please?

A. Harvey Glenn Williams.

Q. I didn't hear your last name. I know it, but I didn't hear you say it?

A. Harvey Glenn Williams.

Q. Williams. And how old are you, Mr. Williams?

A. 42.

Q. Are you a man with a family? A. Yes.

Q. Where do you reside?

A. Yakima, Washington. [483]

Q. What does your family consist of?

A. Two boys and a girl.

Q. What are their ages?

A. The boy 23, and a girl 21, and a boy 19.

Q. And by whom are you employed?

A. Northern Pacific.

Q. And how long have you been employed by the Northern Pacific Railway Company?

A. About 18 years.

(Testimony of Harvey Glenn Williams.)

Q. And in what capacity have you been employed by that company over that period of time?

A. Oh, I was a fireman and an engineer.

Q. Fireman? A. Fireman and engineer.

Q. How long were you a fireman?

A. From 1939 until 1945.

Q. And an engineer from what?

A. From '45 until today.

Q. Until today? A. Yes.

Q. Were you on this train on this date?

A. I was.

Q. In what capacity? A. As a fireman.

Q. On account of seniority is why you weren't running the train? [484]

A. You could call it that.

Q. About how many trips did you make over this crossing on this particular train before the date of this accident, March 8, 1952? Approximately?

A. How many trips on this train?

Q. On No. 5. That was the number of the train, wasn't it? A. Oh, probably 150.

Q. Prior to the accident? A. Yes.

Q. Now, did you see the truck that we have been talking about here on that date?

A. I did.

Q. And where was the Diesel, as nearly as you can remember, when you first saw the truck? Where was the Diesel engine?

A. Oh, I believe it was about—it was just east of the Milwaukee overpass.

(Testimony of Harvey Glenn Williams.)

Q. Are you able to say how far in feet, 100, 200, or 300 feet?

A. Oh, I would say within 100 feet, probably.

Q. Approximately. And where was the truck when you first saw it?

A. Oh, it was about, I imagine, 15 or 20 feet from the crossing. [485]

Q. And was it moving or stationary when you first saw it? A. Moving.

Q. Are you able to give the Court and jury and counsel any idea of the speed of the truck when you saw it?

A. Oh, it was slow, it wasn't too fast.

Q. Well, when you say "slow," do you mean 10 miles an hour or less? A. I would say 10.

Q. And state whether or not that truck, as it approached that crossing, stopped at any point before it got on to the crossing?

A. Well, it slowed down very slow or may have came to a stop, I don't know.

Q. Well, at that time, was it still off the crossing? A. Yes, it was.

Q. And then what did you observe?

A. Well, it started ahead.

Q. Describe its motion. Was it a smooth——

A. Well, it jumped, you might call it jerked, ahead, it wasn't smooth.

Q. Now, do you remember whether or not any whistle signals were given by that train on that date? A. Yes, there were.

(Testimony of Harvey Glenn Williams.)

Q. Are you familiar with this whistling post that we have been talking about here? [486]

A. Yes, sir.

Q. With reference to that whistling post, where did the signals that you know were given start?

A. Well, they started at or very near the whistling post, I would say.

Q. What whistle signals were given by the engineer that you heard?

A. Well, he blew two long blasts.

Q. And then what did he do?

A. Well, he set the automatic air, service application.

Q. Did you give any whistle signals that date?

A. I did.

Q. And you were sitting up there in front with him? A. Yes.

Q. What did you have to do in order to give these whistle signals?

A. Well, I jumped up out of the seat when I saw the truck start for the crossing after it had slowed down.

Q. What did you go for the whistle for?

A. Well, it looked to me like there was going to be an emergency there.

Q. Well, the engineer had been blowing the whistle, and why did you go for the whistle?

A. Well, you can't blow the whistle with your left hand and shut the throttle off at the same time.

Q. I see. In other words, you took over where he left off, is that what you are telling us?

(Testimony of Harvey Glenn Williams.)

A. That's right.

Q. Now, when you went for the whistle, have you any idea where the train was, say, with reference to the Milwaukee overhead?

A. Well, we were by the overhead then.

Q. Well, do you know how far you were by the overhead when you went for the whistle the first time?

A. Oh, I would say it was 200 feet or less. I wouldn't know exactly.

Q. 200 feet west of the viaduct or overhead, is that right? A. That's right.

Q. Do you know how many blasts of the whistle you gave? A. No, I haven't any idea.

Q. Well, what type of whistle signal was it?

A. Just short blasts, continuous.

Q. What you call emergency blast whistles?

A. That is what I would call it.

Q. And do you know whether you gave more than one? A. Yes, I know that.

Q. Do you think you gave more than two?

A. I would say so.

Q. Three? [488]

A. Yes, I think more than three.

Q. All right. Well, what did you see with reference to any person, if anything, in or near that automobile after you started to give these whistle signals?

A. Well, I could see the driver in the cab seemed to be having trouble with the gear shift lever and looking down, I believe, and I could also see some

(Testimony of Harvey Glenn Williams.)

black smoke coming out from the rear of the truck, and it seemed to be that she was having a little trouble with the engine.

Q. And did you see this young girl as she was opening the door and getting out of that truck?

A. Yes, I did.

Q. Did you see her—how?

A. I did.

Q. Well, describe what you saw in that respect?

A. Well, she opened the door and got out on the left side of the truck. Then she went around the truck and I think she tried to close the door with her right hand and at the same time running away from the truck and engine, of course.

Q. Did you see her take any steps away from the truck? A. Yes, I did.

Q. Do you know how many steps she took, approximately? Are you able to judge? [489]

A. Oh, I don't think she made over three or four steps away from the truck.

Q. What have you to say as to the speed of the train around the whistle post, that area?

A. Well, the speedometer faces the engineer and as far as I was concerned, it was just a normal speed of the train at that time.

Q. Well, what is the normal speed of the train at that time and place near the whistle post?

A. Well, it could go 60 miles an hour, that would be normal.

Q. Could be what?

(Testimony of Harvey Glenn Williams.)

A. It could be 60 miles an hour, that would be normal.

Q. Could it be more? A. Could be more.

Q. It could be more, could it?

A. Oh, it could be more or less.

Q. What maximum speed, if you know, were you permitted at that place at that time under company rule?

A. 70 miles an hour at that particular locality.

Mr. McKevitt: That is all. [490]

Cross-Examination

Q. (By Mr. Etter): Williamson or Williams, was it? A. Williams.

Q. Williams. Mr. Williams, when you say the girl went around the truck—is that your testimony?

A. Around the door.

Q. You didn't mean around the truck?

A. No, around the door of the truck.

Q. Went around the door of the truck. How far away, Mr. Williams, were you when you first saw her?

A. You mean how far was the engine from the truck?

Q. Yes?

A. Well, that I don't know for sure.

Q. Was it while you were tooting the whistle that you saw her?

A. Well, I probably saw her when I first saw the truck. That I don't know.

Q. You probably first saw her when you first

(Testimony of Harvey Glenn Williams.)

saw the truck when you were 100 feet east of the overpass? A. Yes.

Q. Handing you Exhibit No. 27, Mr. Scobee has indicated where he first saw the truck, if you recall, his initials appear there. Would that be about where you saw it? [491]

A. I believe that is. That isn't a clear picture, I don't believe, doesn't show a crossing there, does it?

Q. Yes, the crossing is up here (indicating). I can show you another one. That is 900 feet. Here is a picture looking the same way, Mr. Williams, from 700 feet back. In other words, it is just about 13 feet short of being the middle of the underpass. If you will notice, you can see a crossarm down here.

A. Well, in this picture it shows it way up here (indicating); it doesn't show it right here where he has the mark.

Q. It shows what?

A. There isn't any crossing right here where he has the mark.

Q. Oh, no, he indicated that this is where he saw her approaching the crossing; that isn't the crossing. A. No.

Q. He said he saw her approaching the crossing right in through here. It would be here on this picture and where he has marked it on that.

A. I see.

Q. Would that be about where you saw the truck?

(Testimony of Harvey Glenn Williams.)

A. No, I believe it was closer than that.

Q. Closer. Would it be on this one or in between? I mean this one is just going under or just under the overpass. [492]

A. I believe it would be closer to that one.

Q. Would you think it would be a little further west through the underpass or possibly a few feet back toward the east, having in mind that this is 700 and that is 900?

A. I believe it would be a little further back than this.

Q. Fine.

A. Not much, just a little bit.

Q. But it wouldn't be quite as far back as that?

A. I don't believe we were under the underpass when I saw her.

Q. All right, sir, and you saw the truck at that time and you saw the girl in it, is that correct?

A. Well, I saw—probably saw the form of the driver. I don't really know for sure.

Q. Beg your pardon?

A. I probably saw the form of the driver in the truck. I couldn't say whether I did or not.

Q. You probably saw the form of the driver in the truck? A. I think so.

Q. The car was proceeding at that time toward the intersection? A. Yes.

Q. And as I gather from your testimony, it stopped short of the intersection? [493]

A. I don't know that it stopped, but if it didn't, it almost stopped.

(Testimony of Harvey Glenn Williams.)

Q. It almost stopped? A. I would say that.

Q. All right, and how far were you away from it at that time?

A. Well, probably 700 feet or somewheres thereabouts.

Q. Well, that would be when you saw it jerking? A. Yes.

Q. All right. And do you remember how long it was jerking before it got out on the crossing area?

A. What do you mean by "how long"?

Q. Well, you say you saw it jerking when you were about 700 feet back, is that correct?

A. Yes.

Q. Was that when you saw the smoke coming out of it?

A. No, the smoke was coming out of it when it was sitting on the crossing.

Q. Oh, I see. So as I gather, then, it started jerking when you saw it about 700 feet away and jerked onto the crossing?

A. Something like that.

Q. How far did you travel then before it got right out on the crossing?

A. How far did we travel? [494]

Q. Yes? A. Oh, I don't really know.

Q. Well, your engineer, Mr. Scobee, applied his emergency, did he not, as quickly as she got——

A. That's right, as soon as she started.

Q. All right, where was that?

A. Well, that was close to the overpass.

(Testimony of Harvey Glenn Williams.)

Q. Close to the overpass. East of it or west of it? A. Probably west.

Q. Probably west. And, in other words, as I gather it, right at that point Mr. Scobee went into emergency just west of the overpass?

A. Well, some place west of it, I don't know just exactly where.

Q. That is when you reached up and started grabbing the whistle, is that right?

A. That's right.

Q. Now, as I understand, your cab up there, say you were operating the Diesel in this direction (indicating), Mr. Scobee would be to your left?

A. Your right.

Q. To your right, would he? A. Right.

Q. All right. And where would the whistle cord be from you there? [495]

A. About here (indicating).

Q. About there. Did you have to stand?

A. A little further.

Q. Beg your pardon.

A. A little further in that direction (indicating).

Q. Would you have to stand up to grab it?

A. Yes, I would.

Q. Can you illustrate to me about how far you would have to reach?

A. Oh, I imagine just about here (indicating).

Q. About like that? A. Yes.

Q. Would you shut off your view or anything?

A. No, I wouldn't.

(Testimony of Harvey Glenn Williams.)

Q. And you did get up out of your chair?

A. Yes, I did.

Q. And reach for the whistle. And all the time that you were pulling this, you were looking down the track?

A. I got up before I pulled the whistle.

Q. Beg your pardon?

A. I got up before I blew the whistle.

Q. Yes. When he went into emergency, you took ahold of the whistle cord, and while you were pulling the whistle, you were watching up the track?

A. That's right. [496]

Q. About how close were you when you saw the girl get out of the car?

A. I don't know, I imagine 50 feet or something, probably, in that distance.

Q. 50 feet? A. Yes.

Q. Sure it wasn't more than 50 feet?

A. I don't believe so, looked like it was pretty close to me.

Q. And she got out of the car——

A. Might have been——

Q. Beg your pardon?

A. Might have been a hundred, I don't know.

Q. All right, she got out of the car and went around the door and shut it and then started running and ran two or three or four steps?

A. She didn't shut the door, she tried to shut it, I think.

Q. Tried to shut it, you think. Tried to shut it and then ran? A. That's right.

(Testimony of Harvey Glenn Williams.)

Q. Well, were you a hundred feet or were you more than a hundred feet away?

A. I told you I didn't know.

Q. Have you got any idea? [497]

A. I was watching her all the time.

Q. I see. You have no idea, then?

A. I have no idea.

Q. I see. When was it you saw the smoke coming out of the car?

A. Well, I imagine we were about 100 or 200 feet west of this overpass.

Q. West of the overpass? A. Yes.

Q. Did you see somebody in the car then?

A. Yes, I did.

Q. Could you see that it was a girl?

A. No, I couldn't.

Q. Could you see what she had on?

A. No, I didn't see what she had on until she got out of the truck.

Q. Until she got out of the truck?

A. Yes.

Q. I see. What did she have on?

A. Well, she had on a plaid blouse.

Q. That is when she got out of the truck, were you very close to her?

A. I could see through the cab of the truck and see her get out of the truck.

Q. What you saw, then, is substantially the same thing that Mr. Scobee saw? [498]

A. I think so.

Q. You both saw the car come up and you saw

(Testimony of Harvey Glenn Williams.)

it buck onto the track and you saw the smoke come out of it, and so on and so forth; correct?

A. That's right.

Q. Now, when you first saw this automobile as you indicated on that picture some distance possibly in excess of 700 feet but not 900, as the other exhibit showed, were you able to see the whole automobile?

A. Well, I don't know, I doubt it.

Q. Mr. Scobee testified he could see the top of it.

Mr. McKevitt: I object to counsel telling this witness what Mr. Scobee testified.

Q. (By Mr. Etter): Do you recall Mr. Scobee's testimony?

A. Yes.

Q. And do you recall, if you do, that he testified that he could see the top of a car at the point as he indicated on Exhibit 27?

A. Yes, I think he said that.

Q. Yes. Well, now, what was your view of it? Could you see the top or could you see more of it?

A. What do you mean by the "top"?

Q. Well, did you see the whole automobile with the girl in it or somebody in it when you came up right under the underpass? [499]

A. I wouldn't say that I saw all of the car, I don't know.

Q. Well, what part of it did you see? How did you know it was a car?

A. Well, if you could see all but the back wheel, you would probably know it was an automobile, wouldn't you, or you would think it was?

(Testimony of Harvey Glenn Williams.)

Q. That's correct, you probably would. What part of it did you see?

A. I think that probably I didn't see——

Q. All you could see was what?

A. All I didn't see was probably the back wheel or maybe the back fender.

Q. The back fender?

A. I think.

Q. Did you see somebody in the car?

A. Yes.

Q. At that time?

A. That I don't know for sure. I must have, though.

Q. Beg your pardon?

A. I must have, there was someone in it.

Q. And that is from a distance that you indicated when I examined about it, would be possibly just under the underpass or a short distance east of the underpass?

A. That's right. [500]

Q. Beg your pardon?

A. That's right.

Mr. Etter: That is all, sir.

Mr. McKevitt: Have you finished?

Mr. Etter: Yes.

The Court: Just a moment.

Mr. McKevitt: That is all.

(Witness excused.)

Mr. Gaynor.

JOSEPH F. N. GAYNOR,

called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

Q. (By Mr. McKevitt): State your name, Mr. Gaynor, for the benefit of the Court and counsel and the jury, please. State your name.

A. Joseph F. N. Gaynor.

Q. G-a-y-n-o-r? A. Yes, sir.

Q. And how old are you, Mr. Gaynor?

A. 56.

Q. Didn't hear you? A. 56. [501]

Q. And where do you reside?

A. Wenatchee, Washington.

Q. A man with a family? A. That's right.

Q. Wife and how many children?

A. I have a wife, a daughter 20, twin sons 18.

Q. I see. And by whom are you employed?

A. By the Great Northern Railroad.

Q. And your headquarters are at Wenatchee?

A. Yes, sir.

Q. How long have you been employed by the Great Northern Railroad Company?

A. It will be 28 years this coming March.

Q. What is your present position with the Great Northern Railroad Company?

A. Superintendent of electrical operations.

Q. And in what other capacities have you been employed by the Great Northern Railroad Company, if any?

A. I have put in 14 years as superintendent of

(Testimony of Joseph F. N. Gaynor.)

electrical operations, 10 years electrical master mechanic prior to that, and four years as traveling engineer.

Q. When you say "traveling engineer," Joe, what do you mean by that?

A. That was engineer in charge of motive power and engine crews, shops, the maintenance and operation of steam, [502] Diesel and electric locomotives.

Q. And when you occupied that position, where were you living?

A. I was living at Skykomish in that position.

Q. Are you a graduate of any professional school?

A. Yes, sir, a graduate electrical engineer.

Q. Of what university?

A. The Catholic University of America, Washington, D. C.

Q. What course did you pursue at that school?

A. Electrical engineering is my major.

Q. You majored in electrical engineering?

A. Yes, sir.

Q. Did you graduate? A. I did.

Q. Did you receive a diploma? A. Yes.

Q. Following your graduation, what did you do?

A. I was hired by the Westinghouse Electric Manufacturing Company at Pittsburgh, Pennsylvania.

Q. How long did you work for that company?

A. Five years.

(Testimony of Joseph F. N. Gaynor.)

Q. What work did you do working for the Westinghouse people?

A. I was a heavy traction engineer for Westinghouse.

Q. Heavy traction engineer? [503]

A. Yes, sir.

Q. What does that mean?

A. That is heavy road locomotives, Diesel, steam and electric.

Q. In other words, Westinghouse manufactures that equipment? A. Yes, sir.

Q. And that was the position you occupied with them during that five year period, was it?

A. That's right.

Q. And just briefly, what did you do in that position?

A. In that position, my job was the construction of locomotives in the shops, the test of same on test track and road. Then as I went along, why, I was moved up into the design department and proceeded from there to field jobs. I put in railway electrifications in different parts of the world.

Q. Did you have anything to do with the electrification of the Great Northern?

A. Yes, sir, I put the motive power in service in the Great Northern.

Q. Between what points?

A. Between Skykomish and Wenatchee, Washington.

Q. Where is Skykomish?

A. That is a town 50 miles—oh, it is about 72

(Testimony of Joseph F. N. Gaynor.)

miles [504] west of Wenatchee at the foot of the Cascades on the west slope.

Q. I see. Now, Mr. Gaynor, you have had, as I understood, your experience with steam, Diesel and electric locomotives? A. Yes, sir.

Q. Able to operate them?

A. I am, I train the men who do operate them.

Q. Oh, that is what I am talking about. You train the men on the Great Northern who operate those things? A. Yes, sir.

Q. Did you have charge of the training of engineers when there was a switch-over from steam to Diesel? A. Yes, sir, I did.

Q. And have you had experience in the operation of Diesel locomotives for test purposes, stopping, and so on? A. Yes, sir.

Q. What is your answer? A. I have.

The Clerk: Your Honor, I have marked the Defendant's 34, 35 and 36 for identification.

Q. (By Mr. McKevitt): Over what period of time, Mr. Gaynor?

A. Right straight through, since 1927.

Q. And where were those tests made? [505]

A. On the Cascade Division, on the various grades.

Q. What was the purpose of those tests? Was that a company program?

A. Yes, it was. In changing over from steam to electrification and then supplementing that with Diesel power, they made new train schedules, higher speeds for both freights and passengers, and in or-

(Testimony of Joseph F. N. Gaynor.)

der to determine the operating speeds to fit the schedules, you first must know where they will stop.

Q. I see. Particularly with pulling into stations, and so on? A. Yes, sir.

Q. Now, Mr. Gaynor, I will show you Defendant's Exhibit No. 34 for identification. Are you familiar with the type of apparatus that is shown in that? A. I am.

Q. That is what, the Diesel?

A. That is the Diesel electric, a 3-unit, 4500 horsepower Diesel electric, known as F-7 type by the manufacturers.

Q. Is that type of locomotive used by the Great Northern? A. It is.

Q. At the present time?

A. They are standard. Just like buying an automobile, you all get the same kind.

Q. And, of course, your company had those in 1952 and prior thereto? [506]

A. Yes, we did, we had them back in the 40's, we began using them.

Mr. McKevitt: I believe you stipulated, counsel, that this is a blueprint of the Diesel that was on this train?

Mr. Etter: Yes.

Mr. McKevitt: Offer it in evidence.

The Court: That is 35, is it, or 34?

The Clerk: 34.

The Court: It will be admitted, then, Defendant's Exhibit 34.

(Testimony of Joseph F. N. Gaynor.)

(Whereupon, the said blueprint was admitted in evidence as Defendant's Exhibit No. 34.)

Q. (By Mr. McKevitt): Mr. Gaynor, I show you Defendant's Exhibit 35 for identification, which is eight prints.

Mr. McKevitt: It is stipulated, Mr. Etter, as I understand it, that these prints are prints of the eight cars that were attached to this Diesel on that date?

Mr. Etter: That is so.

Mr. McKevitt: Thank you.

Mr. Etter: So stipulated. [507]

Q. (By Mr. McKevitt): Are you familiar with that type of equipment?

A. Yes, sir. Our own No. 5 and 6 run that kind of equipment.

Mr. McKevitt: Offer it in evidence.

The Court: It will be admitted, then. That is 35?

Mr. McKevitt: 35.

(Whereupon, the said print was admitted in evidence as Defendant's Exhibit No. 35.)

Mr. McKevitt: What is this number, Mr. Taylor?

The Clerk: That is 36. It is marked when you open it up.

Q. (By Mr. McKevitt): Showing you Defendant's Exhibit 36——

Mr. McKevitt: And with reference to this, your Honor, counsel will correct me if I am wrong, it is stipulated that this was the speed tape that was

(Testimony of Joseph F. N. Gaynor.)

on this engine at the time that this collision occurred, and that after the train arrived in Seattle, it was removed therefrom and it has not been used on any other engine since that time.

Mr. Etter: I haven't seen this, Frank, I just want to look at it.

I would like to know when these names were put on here.

Mr. McKevitt: Immediately after the arrival of the [508] train in Seattle after it was taken out of the box. The box was unlocked and the tape was removed.

Mr. Etter: And is that pencil or is that——

A. That is a stylus. It is a metal pencil that fits into a piston rod that works up and down at the speed.

Mr. Etter: That gives the impression here?

A. That's right, and this is a chemically treated paper that is sensitive to that particular kind of a brass stylus.

Mr. Etter: I see. This was removed in Seattle?

Mr. McKevitt: Well, he doesn't know that. That is what I advised you. Could bring witnesses over to testify to the fact it would take two men, it would be a roundhouse foreman and master mechanic. That's all their testimony.

Mr. Etter: But I will take your word it has been removed and hasn't been touched.

Mr. McKevitt: Under oath, I will so state.

Mr. Etter: All right. I will stipulate that is the speed tape.

(Testimony of Joseph F. N. Gaynor.)

Mr. McKevitt: Offer it in evidence, your Honor.

The Court: It will be admitted, then.

The Clerk: That is 36.

(Whereupon, the said speed tape was admitted in evidence as Defendant's Exhibit No. 36.) [509]

Mr. McKevitt: I think it should be *help* up, if your Honor pleases, while I am asking the questions, so the jury might get some idea what it is. I have looked at it several times and it is still somewhat of a puzzle to me.

The Court: Maybe Mr. Carlile could hold it, then.

Mr. McKevitt: Yes, could you?

Q. Mr. Gaynor, I notice on this speed tape, Exhibit No. 36——

A. Turn it the other way, you have it upside down.

Q. Oh, I see. You say that this is a special type of paper? A. Yes, sir.

Q. Do you have on the Great Northern on certain of your trains speed tapes of this character?

A. We have it on all of our trains.

Q. All of them. And what is the purpose of a speed tape on a train such as this one here?

A. That is so the officials in charge of operation can get some idea what the operation is. I will be explicit, like take our Empire Builders, when we first put them on——

Q. Make it brief.

A. All right—they were faster trains and, being

(Testimony of Joseph F. N. Gaynor.)

a faster train, certain speed limits were set up between points. Some of the men have a tendency to make use of excess [510] power they had and run too fast. Sometimes passengers get throwed over when they go around curves that way and damage suits come. Therefore, every tape is sent to the trainmaster's office at headquarters and it is examined before it is filed, and that is for the protection of the company, and if a man is alleged to have done something, speeded, and he didn't, that tape will protect him as well as hang him if he is exceeding or going outside the rules.

Q. All right. Now, I notice these circular little holes on the top and the bottom of this tape, Joe. What do they indicate?

A. Those holes do a double duty. There is a roller that is driven by the drive mechanism that meshes with them and each dot is one-half inch apart and that is equivalent to one mile, a locomotive has to progress one mile.

Q. The space between these dots, then, is one mile?

A. Yes, sir.

Q. You might say they represent mile posts on the road?

A. They represent mile posts of distance.

Q. Now, I notice a broken horizontal line on that tape. What does that represent?

A. That represents a vertical distance up this way (indicating) and the curve will give you the miles an hour [511] that the train is running at any point.

(Testimony of Joseph F. N. Gaynor.)

Q. It represents a vertical distance?

A. Vertical distance in miles an hour.

Q. Now, I notice a faint line, Mr. Etter called attention to it, you can trace on here and it fluctuates. What is that?

A. That is the actual speed at every point of the run that the locomotive and train is making from the time it starts out of a terminal until its run is ended.

Q. Are you able to determine from a speed tape, or this speed tape, whether or not brakes were applied at different points?

A. Yes, you can tell.

Q. You can tell that. Now, is there anything else about the markings on here that I haven't asked you which I should ask you so you can give——

A. No, you have covered it. A train starting out at a point, picking up speed, then it runs along, levels off. This particular section here (indicating), a train is running some place around 70, comes down around 60, that will tell a professional engineer looking at that a little information about the grade, too.

Q. It will, huh?

A. But to the train officials, the trainmasters who examine that, all they look at is to see between [512] about—our own road, now; I am not too familiar with yours—between Seattle and Everett, if the train runs 80 miles an hour, then we can

(Testimony of Joseph F. N. Gaynor.)

find some passengers thrown around, then that engineer is all done.

Q. Well, it would show on this tape?

A. That's right.

Q. Now, the Ellensburg station is marked on there?

A. Ellensburg is marked right here (indicating).

Q. And is the scene of the crossing designated?

A. Well, the stopping point of the pilot of the locomotive is designated by this drop here, at this point here (indicating), so that that locates everything in terms of Ellensburg; in other words, the crossing is so many miles from Ellensburg.

Q. How many miles is it? It has been testified four—

A. 4.75 miles, and miles zero at Ellensburg.

Q. In other words, you start at Ellensburg at zero, is that correct?

A. Yes, sir, and you run out when you come to the end of this, this stops at mile post 5.

Q. And you locate the crossing—

A. Then you locate the crossing in terms of 4.75 and the mile post 5.

Q. All right. Now, begin with Ellensburg and ending at or near the crossing, are you able to determine from [513] this speed tape what the speed of that train was?

A. Yes, sir.

Q. Tell us.

A. You can see that okay. Starting at zero at Ellensburg—

(Testimony of Joseph F. N. Gaynor.)

Mr. McKevitt: Are you blocking some jurors' view, Max?

A. I will make the tracing with my pencil and you can follow the pencil. This direction is the direction of travel west and this would be the miles per hour (indicating).

Starting at Ellensburg at zero miles an hour, the train comes out and makes a little jog, and now that wouldn't mean much to another man, but to me it means the engineer applied his running test in here some place or the speed would have gone up faster. Then at one mile, he is going 45 miles an hour; at the end of mile 2, he is up to 55 miles an hour; then he makes a jog down. Now, that jog is out between 2 and 3 miles, two and a half and three miles. That is evidently where that slow order was. And then he come down around 37 miles an hour, I would call it, and he holds it about a quarter of a mile. Then he picks his speed on up and we go from that point, and in one mile he is up to about 60 miles an hour. Then—— [514]

Q. Where is he at that point with reference to Ellensburg or the crossing?

A. With reference to the crossing—we will take Ellensburg, start from there, 1, 2, 3, 4, at mile 4, he is up to 60 miles an hour, and at mile 5, he is stopped at 4.75, he is right about at 64 miles an hour and it had been running that way for some little distance there.

Q. Now, does that exhibit indicate anything about whether brakes were or were not applied?

(Testimony of Joseph F. N. Gaynor.)

A. It does, it shows what they were speaking about here at some point. Well, you can take it from here (indicating), the speed is going on up here, but instead of going up and reaching 64 at a point up here——

Q. When you say “a point up here,” what are you pointing to?

A. Well, it would reach 64 miles an hour, to reach—I will call that terminal speed, because that is the maximum speed it made—it would have reached terminal speed over here, say, a quarter of a mile farther than it did if a brake application had not been made to hold that acceleration down, and it was a service application because it only changed the slope of the curve slightly. Then at this point (indicating) it shows that an emergency braking began. [515]

Q. When you say “at this point,” where is that with reference——

A. That point is right on that crossing, on mile post 4.75, retardation begins and it stops at mile post 5, about a quarter of a mile beyond the crossing.

Q. In other words, it began really to take hold at that point, is that what you mean?

A. It took hold at the crossing, yes, sir.

Q. Now, is there anything else in connection with this tape or effective in this lawsuit that I haven't asked you about?

A. No, you have covered where it stopped at Ellensburg, started, and there is the stop after the

(Testimony of Joseph F. N. Gaynor.)

accident (indicating); there is the run in between the slow order in here.

Q. Now, where is this tape located when it is on the locomotive and in operation?

A. As the engineer sits, assume I am sitting in the engineer's seat, over here is his brake equipment, automatic brake valve and independent brake valve, air gauges in front of them, throttle over here to the left, and also to the left just about at eye level is the speedometer (indicating). That looks like a clock looking at it, calibrated in zero around to 75, usually for the freight engines, and up to 120 on high-speed [516] jobs. And in the top of that tape—or on the top of that box, there is a door that is locked and raises up, and inside of that is where that speed tape and the mechanism to drive it is located. When your hand shows 50 miles an hour on the indicator that the engineer sees, he don't see the tape, he sees the indicator, it is making that mark on the tape, and all variations is spotted on there because the indicator that marks the tape is driven from the hand.

Q. In other words, the tape operation is synchronized with the speedometer operation?

A. That's right, and they are driven from one of the wheels.

Q. Is that standard equipment——

A. Yes, sir.

Q. ——on Class I railroads?

A. That is standard on Diesels, electric or steam engines that use that type speedometer.

(Testimony of Joseph F. N. Gaynor.)

Q. What have you to say with reference to its accuracy?

A. Its accuracy is the best that can be made by the manufacturers. It is known as a positive displacement type.

Q. A what?

A. A positive displacement. It is a hydraulic pump, and the faster that they turn the drive from the wheels, [517] the more volume it shoves up against the piston, and as it does, it just bends the piston farther, because the piston itself is just a slot with the piston in the cylinder there.

Q. Now, I want to go back to these Exhibits 34 and 35. 34 is the Diesel, is it not?

A. Yes, sir.

Q. Now, what type of brakes were on those wheels?

A. Westinghouse brakes are on there and have the Electomatic braking speed system, which is the latest air brake used on roads.

Q. I notice over here some notations, speaks of weight with total load so many pounds. What does that mean?

A. Total load consists of water in the heating tanks where they carry heating boilers for heating the train; sand, which is used automatically on these engines in case of emergency application or the wheels tend to slide, the sanders come on automatically; and fuel oil, each one carries 1200 gallons of fuel oil, about 7 pounds to the gallon, why, you got quite a lot of fuel load.

(Testimony of Joseph F. N. Gaynor.)

Q. Well, now, is there another weight designated on there?

A. Yes, there is a weight dry. That is just as you would get the machine, say.

Q. Well, no, there is——

A. There is a light weight. [518]

Q. Yes. That means without the load?

A. That means without the load, without the heat and boilers and stuff.

Q. This light weight, that means all of the equipment minus——

A. The heating boilers and stuff that is extra, because these engines could be freight engines and not have a heating boiler.

Q. What I am getting at is the weight of this Diesel at the time of this accident. It would be so many pounds plus whatever——

A. Fuel has been used and the water used.

Q. Well, we'll forget the fuel and water.

A. Okay, you use your light weight in this case.

Q. Yes, use the light weight. Isn't it shown right here (indicating), light weight, how many pounds?

A. 693,800 pounds.

Q. 693——? A. 693,800.

Q. My bifocals aren't much good, I thought it was 680. Are you sure it is 693 or is it 683? You can see better than I can. Just so we are accurate on it. A. Yes.

Q. 693,000 pounds? A. 693. [519]

Q. Now, showing you——

(Testimony of Joseph F. N. Gaynor.)

Mr. Connelly: What is the final weight, Mr. McKevitt?

Mr. McKevitt: 693,000.

A. 800 pounds.

Mr. Connelly: Thank you.

Q. (By Mr. McKevitt): Now, going to 35, which——

The Court: That is the Diesel, I assume?

Mr. McKevitt: That is the Diesel, your Honor, yes.

Q. Now, going to Exhibit 35, which are prints of the cars that the Diesel was pulling, what is the total weight of the mail and express car shown on there? Isn't it on this column over here (indicating)?

A. Yes, sir, the total weight is 152,700 pounds.

Q. Now, go to the next.

A. That is mail and express car.

Q. Now, the next is the mail storage?

A. Storage car.

Q. What is the total weight of that?

A. 132,300.

Q. All right. Now, go to the next.

Mr. Etter: May I just see that first one?

A. Sure.

Mr. Etter: You are combining the weight of the body and the trucks and giving us the total? [520]

Mr. McKevitt: Total weight, those are all totals, Max.

Mr. Etter: Fine.

Q. (By Mr. McKevitt): Now, your total——

(Testimony of Joseph F. N. Gaynor.)

A. We gave that 132,300.

Q. That is the mail car? A. Yes.

Q. Now, let's go to this baggage car, what is the total weight of that?

A. Baggage car is 143,800.

Q. Yes.

A. Another baggage car, total weight 144,850. Going too fast?

Mr. McKevitt: Are you getting those, Ellsworth?

Mr. Connelly: Yes.

A. And the next is a lay-back seat of coach, 158,300.

Q. 158,300?

A. Yes. You now come to de luxe coach, 143,700.

Q. 143,700.

A. And reserve seat coach, weight total 159,600; cafe coach, 173,700; and that is all.

Q. I had that total weight added up and I have misplaced it some place.

Mr. McKevitt: May I confer with counsel and maybe we can agree on the total weight? [521]

The Court: Yes.

Mr. Connelly: I am going to add all this. Why don't you just tell me what *it*?

Mr. McKevitt: I think it is 960 tons total, I think you will find it, after you make all those additions and divide by 2,000.

Mr. Etter: We will stipulate that unless we find it incorrect.

Mr. McKevitt: All right. I am not saying that

(Testimony of Joseph F. N. Gaynor.)

960 is right on the nose; I think it is 960 plus, not over 961.

Q. Mr. Gaynor, in determining what distance a train of this character on a particular grade of track, and, by the way, you were in court all during this trial, weren't you, and heard the grade described? A. Yes, sir.

Q. Having that in mind and a dry rail and this type of equipment and the consist of it and weights, what factors have to be taken into consideration in determining within what distance that train can be stopped going at any rate of speed?

A. Going at any rate of speed, the main factors concerned with stopping that or any train is, first, your brake pipe pressure carried; next, your braking ratio; then the brake system efficiency. Another factor entering [522] in this is the coefficient of friction.

Q. Well, now, stop right there. The coefficient of friction, what is meant by that?

A. It is a percentage of the actual drag of the brake shoe on the wheel compared to the pressure of the shoe against the wheel.

Q. I see. Any other factors?

A. And the adhesion factor between the wheel and the rail, which is a friction factor just proportional to the weight carried by the wheel.

Mr. Etter: Will you repeat that last one?

A. Adhesion factor between wheel and rail.

Mr. Etter: Thank you.

(Testimony of Joseph F. N. Gaynor.)

Q. (By Mr. McKevitt): Does that complete them, the factors that you had in mind?

A. That is all the factors you need right now until you get to using your power.

Q. Now, in determining stopping distances, are there lags that you have, if that is a proper expression, take into consideration?

A. Yes, sir, there are.

Q. And what are they?

A. There is the reaction time or lag.

Q. What do you mean by the reaction time or lag?

A. The time it takes the engineer, when he sees something [523] is coming up, to go through the motions and get that brake valve tripped over into full emergency.

Q. Over into full emergency? A. Yes, sir.

Q. You heard Mr. Scobee describe what he did on that date? A. I did.

Q. Have you an opinion as to what time it took him to go through those maneuvers? Answer that yes or no. A. Yes.

Mr. Etter: Just a minute. I don't think he has qualified the witness to testify as to some medical reaction of Mr. Scobee or somebody else, and that is what this is. This has nothing to do with the mechanical end at all, and I will object to it because he is not properly qualified to testify about Mr. Scobee's or anyone else's reaction time.

Mr. McKevitt: If he weren't qualified, I can't find somebody that is.

(Testimony of Joseph F. N. Gaynor.)

Mr. Etter: I have made the objection.

Mr. McKevitt: The reaction time of the individual engineer under a situation of this kind, I think, is a subject——

Mr. Etter: This would have to be an examination as to the psychological elements that enter into it. I mean, to me, it is a purely medical problem and a medical question. He isn't qualified, an engineer, I don't think to—— [524]

The Court: I am inclined to think that it might be a subject of expert testimony as to what the average reaction time would be, the usual. As to Mr. Scobee, I don't know, he would have to be examined by a medical expert, I think, to determine what his reaction would be.

Mr. Etter: If he is going to qualify the witness as to average reaction time, if he can, that is something else again, but I don't think he has.

Mr. McKevitt: I agree with you that——

The Court: I don't think he has so far.

Mr. McKevitt: I should have asked the question what the Court suggested.

Q. Have you an opinion as to what the average reaction time is of the average engineer in making an emergency stop such as was made under the conditions here existing? A. Yes.

Mr. Etter: I think that is all right.

A. I have timed many of my own men.

Q. (By Mr. McKevitt): Well, what is the average reaction time?

A. Average time for a man to go after that

(Testimony of Joseph F. N. Gaynor.)

brake valve, that is, just the motion of going for it and tripping it, is just about a second, and I put a stop watch on to check them. [525]

Q. Then after he throws that lever into full emergency, is there anything else that could have been done on that date to stop that train?

A. Not a thing.

Q. Now, what other element or lag is there?

A. There is a lag known as the braking lag, equipment lag.

Q. Explain that to the Court and jury.

A. Equipment lag, the brake system is a series of charged-up cylinders charged up from the train line or brake pipe, and in making an emergency application, the air that is in this brake pipe has to be gotten rid of first, and as it does, then the triple valves on the cars or control valves move to let the stored air under each car as auxiliary reservation go into the brake cylinder and push it out against the wheel.

Q. And in order to get full braking application, do you have to get it on every wheel on the engine and on every car? A. That's right.

Q. And on the number of wheels shown on these diagrams that are in here, isn't that true? Your answer is yes? A. Yes.

Q. What is that time element?

A. That time element by actual stop watch test will run [526] from three to three and a half seconds.

Q. In other words, do I understand you to mean

(Testimony of Joseph F. N. Gaynor.)

by that that after the full application is made and before you got full application, three to three and a half seconds elapses?

A. Yes, sir, whatever speed the train is doing, it will proceed for about three to three and a half seconds before braking becomes effective.

Q. Now, having in mind the weight of this train as shown on these exhibits and assuming it to be 960 tons, and having in mind the grade of this track that has been testified to here, and the fact of the dry rail, have you an opinion within what distance that train could be brought to a stop going at 50 miles an hour? Have you such an opinion?

Mr. Etter: Just a minute——

A. I have.

Mr. Etter: Pardon me, counsel. Did you estimate horizontal, level track?

Mr. McKevitt: On the grade that is here, slightly ascending, isn't it?

A. Ascending grade, five-tenths per cent, that the stop was made on, yes, sir.

Q. Yes, that is the testimony of Adams.

The Court: That is assumed as part of your question, I take it? [527]

Mr. McKevitt: Yes.

The Court: The grade.

Mr. Etter: I wondered if he had it in.

Mr. McKevitt: Oh, I had the grade in.

Mr. Etter: All right.

Q. (By Mr. McKevitt): Have you an opinion within what distance that train could be stopped

(Testimony of Joseph F. N. Gaynor.)

going at 50 miles an hour? Have you an opinion?

A. Yes, sir.

Q. What is it? How do you estimate it?

A. Does the counsel there permit?

Q. Go ahead, what distance can it be stopped in?

A. 50 miles an hour, about 1,250 feet.

Q. Is that an estimate of one way or another, or is that the least in which it can be stopped?

A. That is about the least it can be stopped in, yes, sir.

Q. Now, going at 55 miles an hour and under the same state of facts, have you an opinion within what distance it could be stopped?

A. Yes, sir.

Q. What would that distance be?

A. Between 1,400 and 1,450 feet.

Q. And at 64 miles an hour under those conditions the speed is maintained, and within what distance could it [528] be stopped going at 64 miles per hour with a full emergency application?

A. Total stopping distance, 1,800 to 1,850 feet.

Q. Now, assuming that engineer applied his brake in emergency 1,000 feet east of this crossing going at 64 miles an hour, have you an opinion as to what extent the speed of that train would be slackened in point of seconds of time?

A. I have.

Q. What is that at 64 miles an hour?

A. At 64 miles an hour, the train would go 1,000 feet in 10.6 seconds on a free run, that is, an unrestricted run. An emergency application in

(Testimony of Joseph F. N. Gaynor.)

that same time would take the train 14.8 seconds to cover the same distance, or it would take 4.2 seconds longer for it to reach the crossing, if you are taking the crossing as the point from which that distance is figured.

Mr. Etter: That is from 1,000 feet?

A. From 1,000 feet, yes, sir.

Q. (By Mr. McKevitt): It means that in this instance, if he went into an emergency when he was 1,000 feet from the crossing, assuming the truck was on the crossing, he would have given that girl a maximum of an additional four and some seconds?

A. That is correct, about four and a quarter seconds to get out of the way. [529]

Q. Now, at take 50 miles an hour, if he was going 50 miles an hour and he applied his emergency 1,000 feet from the crossing, what additional time would he have given the occupant of this truck to escape?

A. At 50 miles an hour, on a free run and an unbraked run, it would take about thirteen and a half seconds for the train to reach the crossing from 1,000 feet out.

Q. In other words, the train is traveling approximately 75 feet a second, is that correct?

A. That is correct, about 74 feet a second, and an emergency-brake run at 1,000 feet from the crossing would take about 18.8 seconds to cover the distance, or there would be an additional five and

(Testimony of Joseph F. N. Gaynor.)

a third seconds, about, for anyone to get off the crossing.

Q. That is with the emergency?

A. With an emergency, yes, sir.

Q. At 50 miles an hour at 1,000 feet?

A. At 1,000 feet, yes.

Q. Now, take a distance of 700 feet, assuming that at 700 feet this train had been dynamited going at 50 miles an hour, what additional time would that have allowed the occupant of this car?

A. It would take it 9.4 seconds to reach the crossing from 700 feet out on a free run. [530]

Q. That is, without brakes?

A. Unbraked, no brakes. And if it were braked, it would take it about ten and a half, so you would get somewhere around about, oh, one and a third seconds time.

Q. How many?

A. One and a third seconds extra, about.

Q. That would be the additional time you would give them under those conditions?

A. Additional time, yes, sir.

Q. Well, now, if at 700 feet from that crossing this train is going—the last speed I gave you was 50, wasn't it?

A. 50, yes, sir.

Q. The train was going 60 miles an hour, what additional time would it have given to that girl if he dynamited at 700 feet?

A. The free run to the crossing would be about eight seconds at 60 miles an hour from 700 feet away, and with an emergency braked run from 700

(Testimony of Joseph F. N. Gaynor.)

feet away, the time to get down to the crossing would be, oh, about five and a quarter seconds.

Q. Well, how much additional time would have been allowed, then?

A. Around two and three-quarter seconds.

Q. How much?

A. About two and three-quarter. [531]

Q. Assuming that the train is going 64 miles an hour and it is dynamited at 700 feet, what additional time would that dynamiting have given that girl?

A. 64 miles an hour at 700 feet?

Q. Yes.

A. Free run would be about 7.4 seconds to get there unbraked.

Q. Unbraked?

A. Unbraked. And with emergency braking on there at 64 miles an hour, it would——

Q. 64?

A. At 64—about eight and a half seconds.

Q. Give her an additional time of how much?

A. Take eight and a half seconds to get down there braked, so the difference between those two would be—the first figure was eight, I believe I gave you—about half a second.

Q. About half a second's time? A. Yes.

Mr. Etter: Didn't you testify 7.4 and 8.5 rather than half a second?

A. You got that equipment lag is in there, 300 feet is off, because when he dynamites, if he is 1,000 feet off, he has only got brakes for the last 700

(Testimony of Joseph F. N. Gaynor.)

feet, that is where he is slowing down. On a free run, you are running a full 1,000 feet. [532]

Mr. McKevitt: You are talking about this computation difference?

Mr. Etter: Yes.

Mr. Connelly: Yes.

Q. (By Mr. McKevitt): What they are talking about is your computation as to what additional time would have been given the girl to get out of the car at a certain rate of speed at a certain distance from the crossing.

A. Okay, 64 miles an hour at 700 feet is your question?

Q. Yes, he brakes at that point, the full emergency application. A. Okay.

Q. Now, what if he had applied his brakes at that point, how much more time would he have given the girl to get out of the truck and get away from there?

A. You are getting outside of the computation I have made here. I will figure this for you in just about two or three seconds.

Q. That is what I want.

A. Okay, 64 miles an hour at 700, that is your question?

Q. 64 miles an hour, 700 feet.

A. Okay. 1.2 seconds is correct.

Q. That is the additional time it would allow?

A. Additional time, yes, sir. [533]

The Court: Will counsel step up to the bench just a moment?

(Testimony of Joseph F. N. Gaynor.)

(Whereupon, the following proceedings were had before the bench, in the presence but out of the hearing of the jury:)

The Court: Is this your last witness?

Mr. McKevitt: Yes, your Honor.

The Court: You will require some time for cross-examination, I presume, with this witness?

Mr. Etter: Gosh, I don't know, it may not be too much at that.

The Court: Do you have rebuttal, do you know?

Mr. Etter: About three questions of one witness, that's all.

The Court: Do you want to try to finish tonight?

Mr. Etter: I would rather not.

Mr. McKevitt: I got a heck of a cold over the holidays.

The Court: Well, we have all day tomorrow, and I had in mind taking the forenoon to discuss these instructions and motions, anyway.

Mr. McKevitt: Fine.

The Court: I think we might as well quit, and then when you get through in the morning, I will excuse the jury until the afternoon. [534]

Mr. McKevitt: I will check with Joe, I don't think I have very many more questions to ask.

Mr. Etter: Actually, I don't think we are going to have too much with this witness.

The Court: Unless you want to go on, I would rather quit now.

Mr. Etter: Could we jointly ask him one ques-

(Testimony of Joseph F. N. Gaynor.)

tion on this speed graph you have here that I can't tell? Can we do that?

Mr. McKevitt: Sure.

Mr. Etter: He asked that it be admitted.

The Court: Any objection to it?

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

Mr. McKevitt: You mean the tape, Max?

Mr. Etter: Yes.

Mr. McKevitt: While he answers, let him come down here. Let's hold it up, you hold it up in front of the jury with me here. I don't know whether we got it upside down or not.

Mr. Etter: No, we have got it right here. [535]

Voir Dire Examination

Q. (By Mr. Etter): Mr. Gaynor, what I want to ask you about your speed tape here, you have here point of impact with truck, but I don't know what they mean. What do they mean is the point of impact? There is no point marked.

A. Well, the point of impact on there——

Q. Where do you see that?

A. Where do you see that?

Q. It is right on point of impact with the truck?

A. What they are going by is that little jog, see that, that suddenly kicks up right here (indicating).

Q. Right here?

A. Right at the beginning of the curve, that little kick-up there. When you hit, it just—as a

(Testimony of Joseph F. N. Gaynor.)

matter of fact, that is one of the ways we recognize impact points from tapes.

Q. And that is the point right there?

A. That point right there. The point of impact that they have marked is the kick-up of the needle as the engine struck the truck. That was rising along at given speed and when it hit the truck, why, the only way it could go was up.

Q. And, Mr. Gaynor, as I understand your testimony, the point of the impact is this dot that is marked on what [536] you might call the confluence of those two lines?

A. Well, this line and the vertical begins to drop, comes together.

Q. Where they come together is the point of impact? A. That's right.

Mr. Etter: All right, thank you, sir.

The Court: It is time to suspend now, members of the jury. We should, I think, finish the testimony in this case early tomorrow morning, that is, not long after we convene, and then there will be some other matters to take up, decisions of law points, so I will probably excuse you until about 1:30 and then have the argument of counsel in the case, and I expect to submit the case to you for your decision sometime late tomorrow afternoon, probably. And with that in mind, after the case has been submitted to you, of course, you won't be permitted to separate until you have agreed or have been given reasonable time and opportunity to agree, so that you had better prepare to come and

(Testimony of Joseph F. N. Gaynor.)

stay for awhile tomorrow. It might be well to bear that in mind and not have your families expecting you home for Canasta or bridge tomorrow, you might be kept rather late.

Court will now adjourn until tomorrow morning at 10 o'clock.

(Whereupon, the trial in the instant case was [537] adjourned until 10 o'clock a.m., Thursday, January 20, 1955.)

(The trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had, to-wit:)

Mr. McKevitt: Sorry for the delay, your Honor. Mr. Gaynor was unavoidably detained.

The Court: All right, so I understand.

All right, proceed, Mr. Gaynor will take the stand.

Had you finished with your direct examination, Mr. McKevitt?

Mr. McKevitt: No, I have one or two more questions. [538]

JOSEPH F. N. GAYNOR

having previously been duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. McKevitt): You are the same Mr. Gaynor who has already been sworn and was on the stand yesterday? Your answer is yes?

(Testimony of Joseph F. N. Gaynor.)

A. Yes.

Q. Mr. Gaynor, since we adjourned last night, at my request, did you make any computations as to the effect of a slowdown of a train by an emergency application of the brakes?

A. Yes, sir.

Q. And did you select certain distances of the train from the crossing? A. I did.

Q. And did you select different speeds of the train? A. Yes, sir.

Q. What distances of train from the crossing did you select?

A. The distances that were spoken of as the mile board, or the whistle board distance, 1,320 feet; the distance between the Milwaukee overpass and the crossing, 686 feet; and the intermediate distance in between that, [539] 1,000 feet.

Q. And what rates of speed did you select?

A. 50 miles an hour, 55, 60 and 64.

Q. What was the result of your computation?

A. A train traveling 64 miles an hour, making an emergency application at the underpass, 686 feet, would arrive at the crossing about 1.85 seconds later than a free-running train unbraked.

From 1,000 feet——

Mr. Etter: Take that a little slow, please. All right.

A. From 1,000 feet, traveling 64 miles an hour, emergency braked, would put that train on the crossing 5.1 seconds later than an unbraked train at the same speed and distance.

(Testimony of Joseph F. N. Gaynor.)

From 1,320 feet, at 64 miles an hour, the emergency-braked train would arrive on the crossing 8.5 seconds later than the unbraked train.

Mr. Etter: That is at 1,323 feet?

A. 1,320 feet, yes, sir.

Q. (By Mr. McKevitt): One question in that regard. Would the train still be moving when it reached the crossing? A. It would.

Q. All right, go ahead.

A. At 60 miles an hour, an emergency-braked train from [540] 686 feet would reach the crossing $2\frac{1}{4}$ seconds later than the unbraked train.

From 1,000 feet, the same train would reach the crossing 5.9 seconds later than the unbraked train.

From 1,320 feet, 60 miles an hour, the emergency-braked train would reach crossing about 9.5 seconds later than the unbraked train.

Q. Go ahead.

A. 55 miles an hour, an emergency-braked train from 686 feet would reach crossing 2.88 seconds later than the unbraked train.

From 1,000 feet, the same train would hit crossing 6.6 seconds later than a free-running train.

At 1,320 feet, 55 miles an hour, emergency-braked train would reach crossing 10.5 seconds later than the free-running train.

50 miles an hour, 686 feet, the emergency-braked train, 4 seconds later on crossing.

From 1,000 feet, same train, 8.1 seconds later on crossing.

And if an emergency application were made at

(Testimony of Joseph F. N. Gaynor.)

1,320 feet, 50 miles an hour, the train would reach crossing about 12.6 seconds later.

Q. Than an unbraked train?

A. Than the unbraked train, yes. [541]

Q. Does that conclude your computation?

A. Yes, sir, that is it.

Q. And the train that you are referring to, for the purpose of the record, is the train that is shown in Exhibits 34 and 35?

A. That is correct.

Q. And one more question I overlooked asking you yesterday: What is the height of the Diesel locomotive measured from top of rail to top of the Diesel?

A. Top of rail to top of cab roof is 14 feet and one-quarter inch. And from the top of rail to the top of horn——

Mr. Etter: Top of what?

A. From top of rail to the top of the horn or klaxon, is 15 feet, zero inches.

Mr. McKevitt: That is all, you may examine.

The Court: What was the height of the Diesel again, 14 feet?

A. 14 feet, one-quarter inch, to the top of the roof. Then the horn sticks up above there the difference to 15 feet.

Mr. Etter: Are you finished, Mr. McKevitt?

Mr. McKevitt: Yes, Mr. Etter. [542]

Cross Examination

Q. (By Mr. Etter): Mr. Gaynor, looking at De-

(Testimony of Joseph F. N. Gaynor.)

fendant's Exhibit 35 for identification, can you tell me whether marked on there some place have we got the outside length measurements?

A. Outside length here is measured between——

Q. Keep your voice up, Mr. Gaynor.

A. Outside length is measured between pulling facing of the drawbar, 74 feet, 21½ inches over the buffers.

Q. All right, now, as to this particular car that is in this exhibit, the length of that car would be 74 feet, 21½ inches; is that correct?

A. Yes, sir, as shown.

Q. As shown. The mail storage car, is it indicated there, the overall length? I see the inside length.

A. We will have to add these.

Q. I notice that is 10 feet, 8?

A. 10 feet, 8.

Q. 42 feet, 11? A. 42, 11.

Q. That is 53, 7, correct? A. And——

Q. 53, 7, that is 64, 5, correct?

A. About right.

Mr. McKevitt: 65 feet? [543]

Mr. Etter: 64, 5.

Q. All right, the baggage car, 73 feet, 6, over end sills?

A. That is correct, over those end sills, but there is the total length here of the car (indicating).

Mr. McKevitt: Keep your voice up, please.

A. The total length of the car as shown is the

(Testimony of Joseph F. N. Gaynor.)

length between buffers where they come together between cars.

Q. (By Mr. Etter): All right, what would that be? A. 82 feet, $41\frac{1}{2}$ inches.

Q. 82 feet, $41\frac{1}{2}$ inches. Baggage car?

A. 82 feet, $41\frac{1}{2}$ inches.

Q. The lay-back seat coach?

A. 79, $81\frac{1}{2}$ over buffers.

Q. And the deluxe coach?

A. 82, $101\frac{1}{2}$ over buffers.

Q. The reserved seat coach?

A. 79, 9, over buffers.

Q. And the cafe coach?

A. 81, $23\frac{3}{4}$ over the buffers.

Q. All right. Now, the Diesel, Mr. Gaynor, which is Exhibit 34, can you tell me what the overall length of the units is?

A. This shows your A unit, we call them, the operating cab, and the B unit, as 100 feet, $91\frac{1}{8}$ inches, or the total length of the three cabs, that is, of the A, B [544] and the middle and the A control cab in the opposite end, 151 feet, $51\frac{1}{2}$ inches, over the couplers.

Q. Over the couplers? A. Yes, sir.

Q. All right. The total length of the train, then, would be the addition of the figures that we have used in the two exhibits? A. Correct.

Q. Now, in computing the factors, Mr. Gaynor, that you gave us yesterday under counsel's direct examination that have reference to the stopping of the train within a particular distance of the appli-

(Testimony of Joseph F. N. Gaynor.)

cation of the air, you told us that, among a number of things, including the braking rates and the brake system efficiency and, I think, six or seven factors, but likewise in answer to questions of counsel you gave other factors which you referred to as lags.

A. Yes, sir.

Q. That is correct. And I think your testimony was that the average reaction time in taking off the throttle and pulling on the air was one second to trip it?

A. One second to the air brake itself.

Q. To trip it, was it?

A. To trip it, one second to trip the brake.

Q. That's right, that was the reaction? [545]

A. After the man decided an emergency is up.

Q. Correct.

A. And the total lags involved from the evidence here, a man was whistling, let go of the whistle, reached down, got the brake and then shut off, I would estimate that to be an average reaction for an ordinary man would be about $2\frac{1}{4}$ seconds altogether. That included the one second to trip that.

Q. Fine. In other words, the lag time from what you know of this, in other words, coming from the whistle down, as you say, to pulling the brake on and throwing the throttle off, you would estimate at $2\frac{1}{4}$ seconds?

A. For that particular operation. Then getting your brake, I would estimate your total lags there would be between 5 and $5\frac{1}{2}$ seconds.

Q. Well, the other lag that you are speaking

(Testimony of Joseph F. N. Gaynor.)

of is the—— A. The equipment lag.

Q. The equipment lag? A. Yes, sir.

Q. And I think yesterday you said that the equipment lag ordinarily would be 3 to 3½?

A. 3 to 3½, yes, sir.

Q. So there were two lags, the reaction lag and the equipment lag? A. That's right. [546]

Q. And speaking to the facts in this case, it would be your expert opinion that the lag time, that is, having reference to the human lag, the human reaction lag, and the mechanical lag, would be what, again? A. About 5 to 5½ seconds.

Q. About 5 to 5½?

A. 5, 5½ seconds, for all of it, yes.

Q. Now, having reference now to the speed tape, you indicated yesterday on the speed tape, you explained the way of reading it. In other words, as I hold it here this way, reading up is your——

A. Miles per hour.

Q. Speed in miles an hour. In other words, starting 10, 20, 30 and going up to 120?

A. Yes, sir.

Q. Reading lengthwise or horizontally on those lines as equal distance, or rather between the punched holes on the side, is a half inch?

A. And that is equivalent to one mile.

Q. That is equivalent to one mile?

A. Of travel, yes, sir.

Q. In travel. And the marker as the train proceeds makes the line which is shown? In other words, you can note from the line the increasing

(Testimony of Joseph F. N. Gaynor.)

speed, the service applications, emergency, and otherwise, by following that [547] line, is that correct? A. That is correct.

Q. Consequently, you are able, are you not, to ascertain distances fairly accurately that train traveled and at what speed by a reading of the speed tape? A. That is correct.

Q. That is correct. Now, if you will step down here just a moment, I would like to ask you a question or two about it.

Mr. Etter: Mr. Connelly, would you hold up the end of this, please?

Mr. Connelly: Yes.

Q. (By Mr. Etter): Just on that part of it, would you step over here? I would like the jury to follow this so they understand it, Mr. Gaynor.

Mr. McKevitt: Mr. Etter, this juror can't see.

A. I can read this thing from the ground here.

Q. (By Mr. Etter): Now, starting the tracing just as an example here, Mr. Gaynor, before we get into it, will you start explaining, oh, from maybe a couple of inches, starting with this line down here at the 10 mile mark so the jury understands perfectly how that operates?

A. Okay, what is that?

Q. Wymer. [548]

A. Wymer. At Wymer, or one mile and a half beyond Wymer, train started out and come up to 20 miles an hour there, 40 miles an hour. They run along, apparently the grade dips a little in there because we have variations in speed, and he held

(Testimony of Joseph F. N. Gaynor.)

his constant speed there, just barely rolling, until he got out here (indicating). Either the grade eases off or there is a little downhill pitch. Must be an ease-off on the grade because there is not sufficient variation here to indicate brake application.

Q. I see.

A. Just the normal rolling of the rails. Coming into Ellensburg, a service stop was made.

Q. How can you tell that service stop?

A. By the slope.

Q. By the slope? A. Yes.

Q. All right.

A. The other one is a violent slope; this is a gradual stop. The stop was begun out here around three-quarters of a mile and comes to a stop. And then it started at Ellensburg, which would be mile post zero as given, and at one mile out, train was going 45 miles an hour.

Q. Indicated by where you now point out?

A. Right here is 45 (indicating). [549]

Q. 45, all right.

A. Then in another mile, he got to 55. See it right here, these two lines (indicating). Then in about a half a mile, he slowed down to around 37, 38 miles an hour.

Q. That was in that protected zone?

A. Protected zone, slow order.

Q. All right.

A. And he held that slow order for about a quarter of a mile, then he began accelerating again, and a mile from there he is back up to about 50 miles

(Testimony of Joseph F. N. Gaynor.)

an hour. And he comes on up here, where it flattens out a little. Now this grade is apparently on either relatively straight or light descending. Then at this point you can see where the thing pitches sharply down.

Q. Well, now, on this line, can you show us whether or not there is a service application of air shortly before this accident occurred?

A. Yes, you can see where there has been a service application of air, where the line would start up in slope and then flattened out slightly.

Q. And you have reference now right to that blue line where it goes here and then it flattens out?

A. Well, here, you are coming up here and accelerating.

Q. That's right.

A. And then your acceleration broke off and flattened out [550] a little bit.

Q. All right, where is that?

A. Let me get that reference.

Q. All right, just turn it around this way.

A. Here (indicating) the acceleration is going along at a fairly level rate until you get up to about 60 miles an hour. That acceleration rate continues, it would come up to that speed that way (indicating), but it leveled off here.

Q. Leveled off right—

A. Right at about that point there.

Q. Leveled off?

A. Yes. All right, the speed, we will work back from the stop point.

(Testimony of Joseph F. N. Gaynor.)

Q. All right.

A. One, two, three, from three and a half miles back of where the train finally stopped.

Q. Two and a half, isn't it?

A. Yes, two and a half, for that slow order. After the slow order had been passed through, the acceleration began picking up at a fairly even rate. Then when they got up to 60 miles, the acceleration was arrested and the speed maintained at about 60 for what looks like, oh, roughly between a half a mile——

Q. Half a mile? [551]

A. Yes, about that.

Q. All right.

A. Then the speed after that point proceeds to accelerate again, which would indicate a release at this point where the curve goes up.

Q. All right.

A. And it was going along at about 64 miles an hour, and then it suddenly dropped to zero in a distance of about a quarter of a mile.

Q. And there is a dot that appears right while the train is accelerating, is that correct?

A. Well, while the train is—see, it runs continuous speed here.

Q. Running constant? A. About 64.

Q. It is even? A. Even at 64.

Q. No jigs or jags?

A. No, it is even for a distance there of about half a mile, and that dot there just before the tape drops——

(Testimony of Joseph F. N. Gaynor.)

Q. Is the collision?

A. That dot pin points the collision. The inertia of the train, no matter how heavy the train is, anything you hit, you can feel the impact.

Q. So that dot—— [552]

A. You don't on the train, but an instrument on there like a speedometer or a guage, you just see the kick.

Q. So that dot indicates, in your expert opinion, the impact because it would bounce that needle a little bit?

A. That's right.

Q. That's correct. But from the dot back for a portion of this as indicated on the gradual run at 64 miles an hour, for a half a mile back there is about a constant speed of 60 miles an hour?

A. Just about.

Q. Just about. And a half a mile back where you see it rising would indicate the air release from the service application?

A. That is correct.

Q. That's correct. By the way, was there any service application of air from half a mile back of the point of impact until the point of impact as indicated on your chart?

A. The service application would be indicated, this indicates the release at this point (indicating).

Q. That is the release. Is there any other service application from the point of release to the point of impact?

A. No, sir. [553]

Q. All right.

A. Just the emergency.

Q. Just the emergency?

A. Yes.

(Testimony of Joseph F. N. Gaynor.)

Q. That distance, as you said, from the release of the service application to the impact was a half mile. You gather that, do you not, Mr. Gaynor, because it is about half the distance of the half-inch marker as indicated by the holes in the side?

A. The last part, the flat part of that curve, would indicate somewhere around about a quarter of a mile that the train had been proceeding.

Q. That's right.

A. At about 64 miles an hour.

Q. That's right.

A. Or around 1,300 feet.

Q. The flat part of the curve?

A. Yes, sir.

Q. That's right. The service application had been released, though, as you say, a half mile back?

A. Yes, the service application had been released at a point where that got up onto that flat part.

Q. That's right. And when it got up on the flat part, then it accelerated up to 64 and then for about a quarter of a mile was running at 64 miles an hour [554] before the impact.

A. That is correct.

Mr. Etter: That is all, Mr. Gaynor.

Mr. McKevitt: That is all.

Defendant rests.

(Defendant rests.)

The Court: Do you have rebuttal?

Mr. Etter: Mr. Ernest Everett.

The Clerk: You may take the stand, Mr. Everett. You have been sworn.

ERNEST EVERETT

plaintiff herein, resumed the stand in rebuttal, having been previously sworn, testified further as follows:

Direct Examination

Q. (By Mr. Etter): Mr. Everett, did you see Mr. Scobee here when he testified?

A. Yes, sir.

Q. Had you ever seen or talked with Mr. Scobee before you saw him in this courtroom?

A. No, sir.

Q. Did you talk with him at all on the date of your [555] daughter's death?

A. No, sir.

Q. Did you talk with any railroad man?

A. Yes, sir.

Q. Who was that? A. The conductor.

Q. How was he dressed?

A. In his uniform.

Q. What kind of a uniform?

A. Well, a conductor's uniform. He had a plate on his cap.

Q. I see. And what did he look like?

A. Well, he was kind of short, smallish man.

Q. And is he the only one you talked to?

A. Only railroad official that I talked to.

Q. Do you remember that you talked to any man that was dressed in the fashion Mr. Scobee said that he was that day? A. No, sir.

Mr. Etter: That is all.

(Testimony of Ernest Everett.)

Cross Examination

Q. (By Mr. McKevitt): Did you seek out the railroad conductor or did he seek you out? [556]

A. Well, he picked me out.

Q. Pardon me?

A. I was standing by my daughter looking at her and he came over there and wanted to know who she was, and I told him she was my daughter. And he started to ask me her name and one thing and another, and in the meantime I looked down the track, I saw another train coming, I says to him, I says, "Here comes another train." "Never mind," he says, "we have a flagman out down there." That's about all that was said that I remember of. And I helped put the girl on the stretcher and somebody else took my end of it and they took her away, and I walked down to the crossing and Mr. Klocke took me home.

Q. Well, you heard Mr. Scobee testify that you told him you had heard some whistle signals from the train? You heard his testimony?

A. How was that?

Q. You heard Mr. Scobee testify yesterday that you told him that you had heard this train whistle? You heard him so testify?

A. I heard him testify, yes.

Q. Did you hear the train whistle?

A. Yes.

Q. And did you know where the train was when you heard it [557] whistle?

(Testimony of Ernest Everett.)

A. No, the train goes behind some timber there that I couldn't tell where it was at.

Q. Well, with reference to the Milwaukee overpass, was it toward Ellensburg or this side of——

A. Well, you see, there is timber and brush down below the Milwaukee, and from where I was standing, after they went behind that timber in there, I couldn't tell where the train was.

Q. But you did testify that standing where you were in the yard that day repairing this bridge or tearing down a bridge over a creek—that is what you were doing? A. Yes.

Q. Wasn't it your testimony that you saw the train a mile and three-tenths away?

A. Why, sure, I could see down toward Ellensburg, but I couldn't see the underpass.

Q. I see. And what kind of whistles was it then that you actually heard?

A. Well, I thought it was a tooting, I couldn't——

Q. Well, were they long blasts?

A. Short, just kind of short whistles.

Q. Pardon? A. Short.

Q. They were short blasts of the whistle. [558]

Mr. McKevitt: That is all.

Mr. Etter: That is all.

(Witness excused.)

I have about two questions I wanted to ask Mr. Gaynor to clear up a point I just remembered.

The Court: All right.

Mr. Etter: Mr. Gaynor, would you take the stand?

Mr. Gaynor: Sure.

JOSEPH F. N. GAYNOR

recalled for further cross-examination, having been previously sworn, testified further as follows:

Cross Examination—(Resumed)

Q. (By Mr. Etter): Mr. Gaynor, I forgot to ask you one or two questions. I think you can answer them very quickly for me. On the lag time that you talked about, that is, the 5-second lag time, now assuming, as you indicated yesterday, the train running at the speed it was running, considering the factors which you were considering, could have been stopped in 1,800 feet or 1,850 feet. Do you remember that? A. Yes, sir.

Q. Now, when you are speaking of that 1,850 feet, are you [559] speaking of the 1,850 feet from the time that the brakes take hold, or are you speaking of that 1,850 feet as being the time that it could stop from the beginning that he starts to make his motion and including the lag time?

A. From the very beginning and including the lag time.

Q. And including the lag time?

A. Yes, sir.

Q. So that the lag time, as I understand it, is the time that there is no effect of braking because of the mechanical lag and because of the reflex human lag?

A. The reaction lag, just the man seeing an emergency come up and going after his levers.

(Testimony of Joseph F. N. Gaynor.)

Q. That's right.

A. But the equipment lag, that is a matter of volumes of air cylinders and piping under the cars, it just has to dump before the brakes can apply.

Q. I see. Now, a man here in this particular situation running, as you have indicated, at the particular speed which he was running and including the lag time, you think that under this situation there was a 5-second lag.

A. I would say including his reactions, there was, yes.

Q. I see. A. Five to $5\frac{1}{2}$ seconds. [560]

Q. In other words, during that length of time, during that 5 seconds traveling, when you are traveling at 64 miles an hour, how many feet would that be? A. 94 feet a second.

Q. 94 feet a second? A. Yes.

Q. So 470, would that be about right?

A. 470 would be it.

Q. 470. So putting this together, from the instant that an automobile or something would be detected, the lag time would occur, that is, the 5 seconds, isn't that correct?

A. If you take an average, between the 5——

Q. I am talking about the average.

A. Yes.

Q. But there would be an average in this case of about 5 seconds lag time?

A. I would say that, yes, 5, $5\frac{1}{2}$, in there.

Q. So the train would travel about 470 feet before braking power became effective?

(Testimony of Joseph F. N. Gaynor.)

A. That's right.

Q. That's right. And then it would travel approximately another 1,400 feet by the time it came to a stop?

A. As shown on your tape there, traveled about 1,320 feet after the brake took ahold. [561]

Q. In other words, so there was 470 feet before it took ahold at all, because of the lag time, and then there was the additional 1,350, or there have been varying estimates of that? A. Yes.

Q. But that is what you indicate by the chart?

A. That's right, that is what the tape showed.

Mr. Etter: That is it, thank you.

That is all, your Honor.

The Court: Just a moment.

Mr. McKevitt: One moment.

The Court: There may be some redirect. I assume this was just additional cross, so you have redirect.

Mr. McKevitt: I may have one question, your Honor.

Redirect Examination

Q. (By Mr. McKevitt): Using the 5, $5\frac{1}{2}$ seconds, you increase that 470 feet then to about 516.23, don't you?

A. Just about, if you use $5\frac{1}{2}$.

Mr. McKevitt: That is all.

The Court: Any other questions?

Recross Examination

Q. (By Mr. Etter): Did you estimate how far

(Testimony of Joseph F. N. Gaynor.)

the front end of the train [562] was beyond the crossing where the accident occurred?

A. Yes, I did.

Q. What was your estimate?

A. 1,320 feet by the impact mark on the tape to where it stopped.

Q. To where it stopped?

A. A quarter mile, yes, sir.

Q. 1300 and—— A. 20 feet.

Q. 1,320 feet from the impact mark?

A. From the impact mark on the crossing, yes, sir, a quarter of a mile even on that tape.

Q. And does the tape indicate that immediately after the impact, the air took hold?

A. It indicates that the air was just taking hold at about impact.

Q. Just at impact?

A. Because just a little bit after this case, but I will give you, when we struck a car on a crossing and a freight train had the same, the impact came up and we ran for about 800 feet after the impact before the tape dropped. Now, that gives you the action time of the brakes.

Q. Right. On the speed chart, though, here, about the same time as the impact, it would be reasonable to [563] assume, the brakes took hold?

A. Impact and braking were simultaneous, I would say.

Q. Simultaneous? A. Yes, sir.

Mr. Etter: Thank you.

A. Effective braking.

Mr. Etter: Thank you.

Mr. McKevitt: That is all. May he be excused?
Mr. Gaynor may be excused?

Mr. Etter: Yes, he may. Thank you, sir.

The Witness: Okay.

(Witness excused.)

Mr. McKevitt: Defendant rests, your Honor.

The Court: Do you have any other testimony,
Mr. Etter?

Mr. Etter: That is all, your Honor.

The Court: I see, all right. Both sides have
rested, then, I assume.

All right, members of the jury, as I indicated
yesterday, there will be some matters we have to
take up that will consume the rest of the forenoon,
so I am going to excuse you now until 1:30 this
afternoon. Report back here at 1:30 and then we
will have the argument and the Court's instructions
and submit the case to you for your decision. You
will be excused now. [564]

Court will take a 10 minutes recess before pro-
ceeding.

(Whereupon, a short recess was taken, after
which the following proceedings were had in
the absence of the jury:)

Mr. McKevitt: May I proceed, your Honor.

The Court: Yes.

Mr. McKevitt: The defendant having introduced
its evidence and having rested, and the plaintiff
having introduced its evidence in rebuttal and hav-
ing rested, the defendant Northern Pacific Railway
Company renews the motion made at the close of

plaintiff's case and moves the Court to direct the jury to return a verdict in favor of the defendant railway company.

Without restating the grounds urged yesterday, I request permission to have the reasons assigned for the motion for directed verdict at the close of plaintiff's evidence incorporated as reasons for the present motion. Is that acceptable?

The Court: Yes, that will be acceptable. It will be assumed that you have merely renewed them at this time.

Mr. McKevitt: Yes. In addition to those grounds, the defendant, in support of its present motion for a directed verdict, now asserts that under all the evidence [565] introduced, it conclusively appears that there was no proof of any substantive character to establish the material allegations of the complaint, and particularly the allegations which cover the application of the doctrine of last clear chance.

Now, off the record, Mr. Oden, if your Honor is still of the same mind that there is a question for the jury, I won't go into a legal argument on the matter. I am confident that there isn't and I think that the only evidence here that could in any event, not admitting that it is sufficient, take the case to the jury, is the alleged failure of the defendant railway company, through its engineer, to have begun this whistle signal at the whistling post, rather than in the vicinity of the underpass. And even accepting that to be true, plaintiff's evidence in that respect, which we must, of course, for the

purpose of this motion, it is the defendant's position that, under all the evidence in this case, it was not a proximate cause of this accident; and, furthermore, under the decisions of the Supreme Court of Washington, which is, as your Honor very well knows, binding upon this Court in cases of this character, even the absence of any signals, under particular circumstances, is not sufficient to charge a defendant with negligence. It can do nothing in that particular, but yet if the physical facts at the crossing are such, [566] having in mind the right of way of the defendant, that the plaintiff's daughter saw or should have seen that train before she got onto the crossing, then she was guilty of contributory negligence as a matter of law, because she violated a positive statute of this state which requires the operator of an automobile to have it under such control as to be able to bring it to a stop within 10 feet, at least, of the closest rail.

The Court: I might shorten this, Mr. McKevitt, by asking counsel to discuss, if he wishes—I mean, counsel for the plaintiff——

Mr. McKevitt: Very well.

The Court: ——the individual or separate grounds of negligence set out in the complaint except (d) and (e).

Mr. Etter: Beg your pardon?

The Court: Except (d) and (e). I am, to say the least, doubtful about whether there was sufficient evidence to warrant submitting the other grounds of negligence to the jury, other than (d), which is the failure to give the statutory whistle or bell signal, and (e), which is the last clear chance.

I also think we might consider, too, whether I would be warranted in submitting both phases of the last clear chance doctrine. The engineer, there is positive evidence here, of course, and the engineer admits that he [567] saw the position of the truck with the girl stopped on the track, but——

Mr. Etter: The question is when he saw it.

The Court: I tried to follow his testimony closely, it is rather indefinite. To use his words, he didn't "pin point" it. And there was evidence of other witnesses that they saw the truck stopped on the crossing just as the train was coming through the underpass. So that my impression is that there would be leeway there for the jury to find that in the exercise of reasonable care, since he had a clear view down the track, he should have seen and appreciated her position of danger before the evidence indicates he actually saw it.

Mr. Etter: I think there is a question here, too, of when he did see it. I don't think the jury is bound by any statement he may make.

The Court: Oh, no. If there is substantial evidence that he should have seen it before he did, then both phases should be given.

Mr. Etter: That is correct. Do you want me to argue on both phases?

The Court: No, I just wanted to get your reaction, whether you are in agreement with me that both phases should be given.

Mr. Etter: Absolutely, absolutely. Now, your [568] Honor, as I understand, your Honor is concerned with (a), (b), (c), (f) and (g).

The Court: Yes.

Mr. Etter: Now, the matter of a defective crossing, your Honor, as to the question of the maintenance of the ballasting and likewise the situation or the condition that has been shown here by the evidence as to there being a four and a half to five inch drop from the top of the plank and as indicated by the exhibit, I submit that a number of cases here——

The Court: Well——

Mr. Etter: This is outline.

The Court: I don't seriously question that a defective condition right alongside of the planking and forming almost a part of the planking crossing there would be negligence if it had continued long enough to assume that the railroad company had notice of it.

Mr. Etter: That is correct.

The Court: And there is evidence of that here, I should think, but the thing that concerns me is whether there is any substantial evidence of a causal connection, whether there is any evidence of proximate cause on which the jury could find that the death of this girl proximately resulted from that condition of the crossing.

Mr. Etter: I think, your Honor, my theory is there [569] can be contributing causes which can be proximate causes.

The Court: Sufficient if it is a proximate, doesn't have to be the one?

Mr. Etter: Doesn't have to be the one, it can

be a combination of them. Here there might be the last clear chance after they saw her, but the original position in which she found herself could have been a combination under the doctrine of her negligence, as they maintain, and the jury is entitled to determine it, and likewise whether or not it is their negligence if the jury elected, say, to disregard last clear chance and say, "Well, no, it isn't that; it is the fact that it was their negligence in maintaining the ballast." And I have——

The Court: What inference would the jury have to draw now?

Mr. Etter: The inference the jury could draw was the fact that this girl, going up this steep incline in gear and going slow so she could look or see what was coming down, in view of the evidence that it was difficult to see and in view, as a matter of fact, of the engineer's testimony that he only saw it 25 feet away when he came under the underpass, which would mean she couldn't have seen him, being down in a car, sitting in a panel truck, at an angle about two feet above the ground, looking through the brush, while he was sitting up in a position 15 feet when he [570] could look down, so that the jury could assume that as she went slowly onto the track, that as her front wheels went over, the back wheels hitting this bump, there wasn't sufficient power; in other words, she wasn't in gear or didn't have the accelerator down far enough to take her over and it killed the motor.

And all these cases I have here, eight or ten, that happened in each case, because of two or three inch

dropping to the rails or in the plank and the car stalled because of that.

The Court: Of course, in those cases there probably was evidence that that was the cause of the stalling, wasn't there?

Mr. Etter: The evidence was from the driver that as he went over this bump, the car dropped down and did stall. Now, here there is nothing, but we have circumstantial evidence and circumstantial evidence alone from which a reasonable inference may be drawn by the jury and they are in common and ordinary every-day life. For instance, I think your Honor, at least I have, has gone up on a curbing near the entrance to the roadway and had the car stall. I think everybody has had that situation.

So it is on that basis, we have no direct testimony of the deceased as to what caused her car to stall, but we have the evidence that it was stalled, now we are [571] looking for the cause. And I have those number of cases, but I am not going to go into those because your Honor understands exactly what my position is.

The Court: Yes, I do. All right.

Mr. Etter: Now, your Honor, actually the other allegations of negligence with respect to the excessive speed, referring now to (a), and the matter of the signal and the matter of watchmen and the maintenance of the roadway in the proper condition, I think that is a question of fact for the jury to determine under the peculiar circumstances which have been shown here and under the case of Brad-

shaw vs. Seattle, which is the latest one, railroad case, in 43 Washington (2d).

Mr. McKevitt: What page number?

Mr. Etter: Page 766. Now I want to point out, your Honor, this is——

The Court: Bradshaw vs. Seattle?

Mr. Etter: Bradshaw vs. Seattle, 43 Washington (2d), 766; 264 Pacific (2d), 265. The reason that I have this case, your Honor, is this: There is quite the same problem here as is raised by counsel for the Northern Pacific, the defendant. Counsel has made reference here, “Well, we don’t have to maintain this country road, that isn’t our job, and there is no law that says we have to do it. If the county wants to maintain their road, fine and dandy; if they don’t, [572] that is none of our business.”

Now, this case came up on the basis of a suit brought against the Northern Pacific Railroad and against the City of Seattle. The accident happened on a street in Seattle where tracks came across the highway, and some of them had been torn up and one of them had been left in there, it hadn’t been used a great deal of time, and the street itself was maintained in good condition, and along the side there was some brush. So this fellow was driving along the avenue and he approached this, and, of course, his allegation was the train came across here, it was unusual for it, he hadn’t expected it, hadn’t seen it a number of times before.

The Court: I just begin to recognize that. That is cited at the bottom of one of your instructions here.

Mr. Etter: That is correct.

The Court: 43 Washington, 766. I examined that last night. That is on the theory that this crossing is so extraordinarily and peculiarly dangerous, it is the duty of the railroad company of taking special precautions to have watchmen.

Mr. Etter: That is correct.

The Court: Or special signaling device.

Mr. Etter: Signaling or signs or some particular warning. [573]

Now in this case the Court said that: "A crossing * * *" and, of course, it refers to another case that was cited:

"A crossing is extrahazardous where unusual circumstances or conditions exist which make it so peculiarly dangerous that prudent persons cannot use it with safety unless extraordinary measures are used. Considering all the circumstances present in this case, including the similarity in appearance between this crossing and the abandoned ones on the same street, the infrequency of its use, the limited view of an approaching train, and the lack of warning precautions, we cannot say as a matter of law that the crossing was not extrahazardous."

Now, there they had those elements of the infrequency of use, limited view of an approaching train. We have the limited view of approach; we have the lack of warning precautions; we have the existence of the planking in the condition it was; we have the angle upon which cars enter that highway at an angle directly opposite from the overpass; we have the existence of the brush; we have a slope going

up finally, as indicated, in a distance of about [574] 60 feet; in other words, we have 200 some feet without any slope and then a gradual one, and then we have a four and a half foot approach there right to that track, with ballasting in the way; and we have a 45 or an 80 degree angle turn across the top of it.

My position here is this: I don't think I can say as a matter of law that it is or isn't, but I think that under this case and under some other cases I have here, that those elements, so far as we are concerned, all go to the question—I mean, all make a question of fact for the jury as to whether or not they consider it as such.

Now I want to cite the case applying to those four sections that are under discussion of *Van de Water vs. the New York and Northeast Railroad*, 26 New York Supplement and——

Mr. McKevitt: What page?

Mr. Etter: 26 New York Supplement, 397.

They held there that an instruction that a railroad operating trains at crossings must use greater vigilance where the danger is greater, and that any neglect to give a warning of the approach which is proper under the peculiar circumstances renders——no, that isn't the one. Let me see here. Oh, 22 L.R.A., 233, that is what I wanted to read, 22 L.R.A. 223:

“Due Care. This is usually a jury question”——

Mr. McKevitt: 233, Max?

Mr. Etter: Yes, 233. (Reading):

“This is usually a jury question, and whether

or not, in view of obstructions, the railroad has exercised ordinary care in respect to the peculiarly dangerous condition. In other words, would an ordinarily prudent man have taken extra precautions, or were such precautions taken in this case, are question for the jury."

60 A.L.R., 1106: "Where the evidence shows that a railroad crossing is for any reason peculiarly dangerous, it is a question then for the jury whether the degree of care which a railroad is required to exercise to avoid accidents at crossings imposes on the company a duty to provide some safety device at that crossing."

60 A.L.R., 1113: "The evidence that a traveler's view of an approaching train is obstructed may warrant a finding that the railroad was negligent in failing to maintain gates or some other [576] safety device at the particular crossing in question."

Coles vs. The New York, New Haven & Hartford Railroad Company, 66 Atlantic, 1020; 12 L.R.A., 1067: "A railroad is not negligent in failing to remove or cut down weeds upon its right of way which obstruct the view of the railroad crossing. However, the failure of a railroad to remove those obstructions may be viewed as affecting the nature and the degree of care required of the railroad in the operation of its cars."

In other words, at that particular crossing.

Indianapolis & St. Louis Railway Company vs. Smith, 78 Illinois, 112:

"It is the duty of the railroad to keep its right of way free from obstruction so that persons ap-

proaching on a highway may readily ascertain whether there is danger and the employee in charge of the train may be able to discover whether there is anything on the track, and to permit or to suffer hedges or trees or weeds or anything else to grow upon the right of [577] way or to such a height as to materially obstruct the view, is negligence.”

Overbush vs. the Great Northern Railroad, 55—no, let me see. Mattingley vs. the Oregon-Washington Railroad Company, 153 Washington, 514. This, of course, has reference to the matter of charging any negligence against the deceased where there are no independent or no disinterested witnesses, but the crossing here was also a crossing that involved hazards.

Now, 5 A.L.R. (2d), referring to hazardous crossings, 5 A.L.R. (2d), 149, there is a citation of many cases that indicate that the presence of weeds or underbrush or shrubs can constitute a crossing unusually dangerous, and, if so, then the railroad is under the duty to take extraordinary precautions to guard against the dangers of that crossing which might arise in the ordinary operation of the railroad.

154 A.L.R., 227, under the heading “Negligent Speed of Trains at Crossings with Obstructed View”:

“Where a railroad has permitted trees or bushes to grow upon the right of way, obstructing a view of the crossing, as well as the view of persons using the highway near the crossing, it becomes the duty of the railroad to use extra [578] precautions to

avoid collisions, as by diminishing its rate of speed or by increasing the warnings given or by keeping a watchman on duty or by using some other sufficient means which may warn travelers upon the highway."

And 154 A.L.R., 227: "In the absence of some extra precaution, such as a crossing gate or a flagman, an obstruction to a view at or near a crossing calls for a lower speed than that which would be possible if the view were not obstructed."

Then *Hubenthal vs. The Spokane-Inland Empire Railroad Company* is a good case on obstruction of view, 97 Washington, 581. In that case they held that:

"To run or to operate a train through a deep cut emerging immediately upon a much used public crossing, where adequate view of the track from the roadway was much obstructed, at anything like 50 miles an hour, with no warning signs save the faint sound of a whistle an instant before reaching the crossing, was palpable negligence." [579]

In other words, there it was the matter of coming out of a cut, but it was an obstructed view of a much-used crossing and an inadequate view, as they have indicated, an inadequate view of the track from the roadway, and here, of course, there was. And they said that coming out onto a crossing of that kind at 50 miles with no warning was palpable negligence.

Now the question here, I don't think there is any doubt that there is an issue made in this case with regard to the matter of an obstructed crossing. You

take and combine the matter of the obstructed crossing, and that is in the Hubenthal case with reference to a traveler on the highway, your Honor, viewing it along with the physical circumstances of the maintenance of this crossing, I think that those are all proper elements of negligence going toward the testimony here that there were no warning signs on either side except this post that shows up on the one side and not on the other.

I think that all of these factors are elements that do two things: They show, first, an obstructed view and indicate in their entirety that because of each one of them, the crossing is of an extrahazardous character to users of the roadway; and that, No. 2, because it is an extrahazardous crossing, each one of those applies in its specific allegation of negligence because each one of them [580] is an element of negligence that creates and imposes, as the Hubenthal case says, the duty upon a railroad to take extra precautions because of them, and they say the failure to so do was palpable negligence.

It is my feeling that those allegations do constitute negligence; that there is sufficient evidence to sustain them in this respect, that they should be submitted to the jury, under proper instructions, and let the jury determine from the conflicting evidence, and I might say this, there has been no conflicting evidence as to the character of that crossing, your Honor. I might say that there has been no conflicting evidence as to the character of that crossing either from the documentary evidence or from the witnesses themselves. And, therefore, I

think that the jury has a right, under the Bradshaw case and under A.L.R., to determine, in other words, if there is one thing wrong, where it did constitute a peculiarly dangerous crossing.

The Court: Another thing that I assume, probably, that I know, but then I want to be sure, what is your position with reference to submitting to the jury the question of contributory negligence on the part of the plaintiff?

Mr. Etter: I don't think that there is a showing at all under the rule, and I have the case on that, the Mattingley case, which is conclusive of that.

Mr. McKevitt: What is the citation?

Mr. Etter: Mattingley vs. Oregon-Washington Railroad and Navigation, 153, Washington, 514. We have cited a couple of other cases there, too.

The Court: 153 what, did you say?

Mr. Etter: 153 Washington, 514. And this is a quotation in that case from Smith vs. Inland Empire Railway Company, 114 Washington, 441:

"Since no one saw the deceased at the time he approached the crossing, and since there was no evidence to show what he did at or before he attempted to cross the railway track, it must be presumed that he used due care. If his engine was running, making a noise, as it no doubt was, and if he approached the crossing and stopped, looked and listened before attempting to make the crossing and did not hear the crossing bell or the approach of the train and did not see it until it was too late to avoid the accident, he was clearly not guilty of contributory negligence."

In other words, they go to this extent there, "It must be presumed that he used due care," and the later [582] case, unless, there is proof by a disinterested witness, unless there is evidence of a disinterested witness, the presumption still carries. I mean, the only proof that is applicable is a disinterested witness and it cannot be found by circumstantial evidence, that cannot overcome the presumption, and that case is cited in the instruction.

The Court: I refer counsel to *Hutton vs. Martin*, 41 Washington (2d), 780, in which that rule has been abrogated.

Mr. McKevitt: Yes.

The Court: Adopting Dean Faulkner's theory that, since the defendant has the burden of proving contributory negligence, it would be a double presumption to instruct the jury. In that case, it was reversible error for the court to instruct on this presumption of due care, and I am in danger of overlooking that at times and I finally got it imbedded in my memory.

Mr. McKevitt: In other words, that decision Mr. Etter refers to has been overruled by the Supreme Court of this state.

The Court: The prior decisions were overruled in *Hutton vs. Martin*.

Mr. McKevitt: Well, then, there is another very apparent reason why he can't invoke the doctrine of the presumption of due care. In his instruction on the last [583] clear chance, he has told the Court to advise this jury that the driver of that truck

was negligent, because last clear chance implies negligence on the part of the party invoking it.

Mr. Etter: We both understand, Mr. McKevitt, that we can submit instructions on alternative rules of evidence. You know, as well as I do, I am not bound by that, as you well know.

The Court: I will hear you, Mr. McKevitt, on your points.

Mr. McKevitt: Well, I think if I understood your Honor correctly, you asked counsel to address himself to all of the subdivisions of Paragraph VI of the complaint with the exception of (d) and (e); is that correct?

The Court: Yes, you had already discussed those.

Mr. McKevitt: Well, for the purpose of the record now, I move the Court to withdraw from the consideration of the jury Subdivision (a) of Paragraph VI, for the reason and upon the ground that there is no evidence of a probative value or substantial value to submit that issue to the jury.

The same motion is made separately as to Subdivision (b) of Paragraph VI—

The Court: Pardon me, you hadn't finished your motion. [584]

Mr. McKevitt: The same motion is made with reference to Subdivision (b) of Paragraph VI.

The Court: I think we have been overlooking here, I assume you want to direct a motion to Paragraph VII, too?

Mr. McKevitt: Yes, I am going to.

The Court: The issue of wanton misconduct.

Mr. McKevitt: Yes, I am coming to that, your

Honor. This is Paragraph VI. If he had proved that, the man would have to go to jail.

The defendant makes the same motion with reference to Subdivision (c) of Paragraph VI and for the same reasons.

The defendant makes the same motion with reference to Subdivision (d) and for the same reasons, and for the additional reason that there were sufficient crossing signals, under plaintiff's own evidence, given to have apprised this girl of the approach of this train in time for her to have avoided the injury, and for the further reason she was specifically instructed by her father before she left the farm to watch out for trains.

The defendant makes the same motion with reference to Subdivision (e) of Paragraph VI and for the same reasons.

The defendant makes the same motion with reference to Subdivision (f) and for the same reasons, and for [585] this additional reason: Counsel has talked a great deal about this being an extrahazardous crossing and a dangerous crossing, and one of the reasons assigned for that is this, that we had permitted an accumulation of weeds and trees and brush on our right of way. Now, so far as the evidence in this case is concerned, your Honor, there is no evidence here that our right of way is wider than the outside ties on either side of that rail. Now, I know that that is not the fact, that we have a wider right of way, and I know what the right of way is. But when Mr. Adams was testifying in this case, he was never asked what is the width of

the Northern Pacific right of way there and the jury has no right to speculate that it extends beyond the ends of the ties.

The Court: I think that might have a bearing on the question of the direct allegation of your negligence in failing to keep your right of way clear, but wouldn't it be true that, regardless of whether extrahazardous conditions were of your making or not, if they were there so as to make it especially hazardous, then it might impose on you the duty of taking special precautions, such as the special signal devices?

Mr. McKevitt: I see your Honor's point, but this takes us into the question of whether this is an extrahazardous crossing. [586]

The Court: That is another point.

Mr. McKevitt: Very well.

The defendant makes the same motion with reference to Subdivision (g) and for the same reasons, and for the additional reason that, assuming the crossing to have been in the condition that plaintiff claims it to have been in and that it was in a bad condition and that we were negligent in permitting it to get into that condition, in the absence of any testimony that that crossing had something to do with causing this truck to stall, then it has no place in this lawsuit.

Now, there is no witness, apart from the railway employees, that testified in any respect with reference to the approach of that crossing, and there certainly isn't anything in the testimony of Mr. Scobee or Mr. Williams from which the reasonable

inference could be drawn that that drop contributed to or caused the stalling of that car.

Now, the defendant moves the Court to withdraw from the jury's consideration Subdivision (a) of Paragraph VII, and that is where he charges us with:

“* * * intentionally, and with a reckless indifference to injurious consequences probable to result therefrom, drove said train at a speed between 70 and 80 miles [587] per hour * * *”

The Court: I don't want to prevent you from making what you consider as an adequate record here, Mr. McKevitt, but all of those under VII pertain to wanton misconduct and I wondered if you couldn't group your objection, simply object to all of them?

Mr. McKevitt: Move that they be withdrawn.

The Court: Because I neglected to ask counsel about it, but my present inclination is it doesn't warrant submission of wanton misconduct and, of course, they all come under that heading, (a), (b), (c), (d).

Mr. McKevitt: I don't know, does (d) VII come under a charge of wanton negligence? I don't think the term “wanton” is used in that.

The Court: (Reading):

“(d) Defendants wantonly maintained the said crossing * * *”

Then the heading of it is that Erna Mae Everett's death was further caused by wanton misconduct.

Mr. McKevitt: Oh, I see.

The Court: In the following particulars.

Mr. McKevitt: Very well, then, I will content myself with moving the Court to withdraw from the jury's consideration all of the allegations of negligence contained in Paragraph VII. [588]

The Court: Yes. To be accurate, I don't want to be too technical, but to be accurate, they are not grounds of negligence, because wanton misconduct is not negligence. That has been definitely stated by the Supreme Court of this state. It goes beyond negligence, intentional harm.

Mr. McKevitt: Yes. There is a recent decision on that use of those terms—wanton misconduct is not negligence. When I first saw that, I thought, well, that is a peculiar statement; when you analyze it, you can see what it is.

Very well. Now I want to address myself to this question of the last clear chance doctrine. Of course, as I have indicated, I do not believe, in the absence of expert testimony on the part of the plaintiff, that there was an issue made for the jury. However, counsel, I don't believe, will quarrel with me, and I know the Court knows it to be the law under the decisions of this state, that the question of the application of the last clear chance doctrine, in the first instance, is a question of law for the Court. I could get your Honor that pronouncement, but I know that you know it is the fact.

The Court: Yes.

Mr. McKevitt: Well, if that is true, it is my position then that either the first phase applies or the second phase applies, and it isn't up to the jury

to [589] determine which one applies; it is my candid opinion, under the decisions of the Supreme Court, that your Honor has got to determine that; because if you have to determine, in my view, the application of the doctrine, if as in this state, different than Idaho where they only have the one branch, here we have two, if you have to determine the application of the doctrine and it has more than one branch, then I think the duty is imposed upon the Court to determine which branch of the doctrine applies, and the jury is not permitted to determine that question.

Now, on the question of whether or not this is an extrahazardous crossing, of course, we have to, I think, take into consideration first the very important factor that this girl had knowledge that this was the main line, the knowledge that she had of the existence of the crossing, and the knowledge that she had of the passage of that train over that crossing every afternoon about that time.

Now, when you come to determine what an extrahazardous crossing is, our Supreme Court had never defined that until the case of *Hopp vs. Northern Pacific* in 20 Washington (2d) at Page 439. That was the case that was permitted to go to the jury down in Lincoln County, a verdict of \$26,000 was returned against the railway company, and reversed outright in the Supreme Court, and in that case it was urged that this was an extrahazardous crossing. [590]

The Court: It was in the city limits of Davenport?

Mr. McKevitt: Yes.

The Court: That case?

Mr. McKevitt: Yes. He was a barber at Harrington, Jake was. (Reading:)

“The respondent alleged that the crossing was extrahazardous and that the appellants were negligent in failing to keep a watchman or automatic signal alarm bell at the crossing. The deceased was familiar with the crossing and had a clear and unobstructed view of the track, in the direction from which the gas motor coach was approaching, of from 1,000 to 2,800 feet when he was at a distance of one hundred feet from the crossing. In *Missouri K. & T. R. Co. vs. Long*, 299 S.W. 854, the court held that a crossing is more than ordinarily dangerous if it is so peculiarly dangerous that prudent persons cannot use the same with safety unless extraordinary means are used to approach such place. The crossing was not an extrahazardous one, as a matter of law, under the facts of this case.” [591]

And I say that the crossing that we have here falls within that definition.

Now, counsel makes a statement, he says, “I don’t think there is any dispute between us here as to what the conditions at that crossing were with reference to its being,” as he characterized it, “‘an obstructed crossing.’” Now, I don’t go along with him on that and I say that those two panoramic views, and particularly the view that is shown, the camera 180 feet from that crossing, anyone looking at it from that point, sitting in an automobile when 180 feet from that crossing, can see that viaduct

unless these are doctored photographs. And you can see the rails at different points along there. If your Honor will observe the points, you can see the rails of the track. Now, when you take the one that is 25 feet from the crossing, how anyone can contend that that is an obstructed crossing by way of weeds and brush is beyond my ability to comprehend.

Now, of course, there was some duty on the part of this girl to make sure that a train was not approaching. Now, counsel has been down there and he has been at this crossing and so have I, but relying on these photographs, and I don't care what the angle of that road is, namely, that it doesn't approach that railroad at right angles, even if it approached at as sharp an angle as this and the [592] train is coming from that direction, when she is 15 feet from that crossing all she has to do is turn her head in that direction and there she has got a clear view of that train. I suppose there was attempted to be developed here through the testimony, well, you can't see the train until you get pretty close up to the crossing, until you are almost on the crossing. Well, your Honor knows from these photographs that that is not true, and I don't care what the testimony of individual witnesses may be, when the uncontroverted facts speak as clearly as they do in this case, no person is going to be held to say something that is in direct contraversion of these facts.

The other proposition is that, as your Honor well knows, they not only must look and listen, but

they must look from a point where looking, they can see, and listening, where they can hear.

The Court: I think we must bear in mind, too, the distinction between city crossings and country crossings.

Mr. McKevitt: Yes.

The Court: The volume of traffic is something that enters into it, where you have a stream of traffic moving constantly and continuously, such as you would have perhaps on North Division, you have got one situation; you get out in the country where you have a country road crossing and also a positive duty enjoined on motorists crossing [593] country crossings to maintain a speed at which they can stop within ten feet of it.

Mr. McKevitt: That's right.

The Court: So that I think the two situations have to be considered in different circumstances.

Mr. McKevitt: Yes. And the absolute right of way, that while the rights are relative, the duties are relative at a crossing, your Honor well knows the Supreme Court has said a hundred and one times that we have the right of way and it must be accorded to us. And I think that under the evidence in this case, it is my view——

The Court: Of course, it has no bearing here, but it just aroused my curiosity as to just what agency is it that determines whether or not you shall maintain special safeguards at these crossings other than in a city? Does the Interstate Commerce Commission or a state agency?

Mr. McKevitt: No, that is going back now, that

question did come up in the Hopp case, and Judge Schwellenbach, Ed Schellenbach was the trial judge, he came over from Ephrata, and we had that up there, Mr. Kelley was on the other side, and it is my recollection now that with reference to the establishment of these mechanical devices, the procedure generally is that the residents of the area will petition the county commissioners and the county commissioners then petition the Department of Public [594] Service and then there is a hearing held with the railway company.

The Court: I don't want your attention diverted too much from the issues here.

Mr. McKevitt: That is the way that is arrived at.

Well, I have nothing further to say in this regard, unless I have left myself unaddressed to some problem.

The Court: I can think of nothing, no.

Mr. McKevitt: Very well.

The Court: Do you have anything further?

Mr. Etter. Yes, I have just one or two things to say, your Honor.

In the first place, the Hopp case is referred to in the Bradshaw case and the railroad made a very vigorous argument here on this matter. They said that mathematically it was definitely certain, and the court, referring to the number of these cases, the Hopp case, says that while these cases all resulted from grade crossing accidents, none of them involved the situation like that presented here and each case of this type must be considered in the

light of its own particular facts. Then they go on and say, furthermore, that:

“Nor did the court err in refusing to hold, as a matter of law, that Mr. Bradshaw’s [595] negligence was the sole proximate cause of the accident. It is argued that the ‘physical facts’ speak with such force as to overcome all testimony to the contrary.”

Then they talk about the 26 photographs taken at different angles and distances and an example of the railroad asserting conclusively that:

“***a driver approaching the crossing from the south could, when 250 feet from the rails, see a locomotive on the spur track 157 feet northeast of the pavement.”

They say: “The problem is not that simple. There was no evidence that the locomotive was within 157 feet of the pavement at the time Mr. Bradshaw was 250 feet from the crossing. The speed of his car and that of the locomotive, their relative positions just prior to the accident, and the amount of obstruction to the view, were all matters of dispute.”

And, therefore, the court properly declined to rule, as a matter of law, that he was contributorily negligent. [596]

Now, counsel points to these photographs, your Honor, talking about disputes, points to these photographs, and yet you can take two more of them over here and here is a camera placed at 350 feet east of the crossing facing westward and you look down at the crossing, and that is within 350 feet, you can’t see a thing back here. And you take

this one, which is 300 feet, you move it down 50 feet more, and you can see the top of a car. Now, that is the first time you can see the top of a car. The Hopp case, it was absolutely flat and within 100 feet he could see over 1,000 feet. And there is another thing that we haven't got in any other case, we have an overpass coming over at an angle over the top that obstructs this view because of the angle, so that a person getting up here within 25 feet, even on his photograph, can't see through but only to the mouth, which would be a total of less than 600 feet, even from 25 feet, is all that could be seen; that is, if you are up in a position where you can see. It isn't that where you are up an ascending grade and looking to your right. In other words, these other cases didn't have the example of an overpass that obstructed from view and obstructed, as a matter of fact, from the trainman's view himself until he came under that underpass unless the car was directly on top of the crossing.

So that the obstruction in the Hopp case being over, as they say, way over 1,000 feet and the level approach, all of those things, none of them would apply here, and, as in the Bradshaw case, there are more things in dispute here than the few things they mentioned in the Bradshaw case.

Now, I don't know whether your Honor wants to hear me on this matter of last clear chance, but if there are any questions that you have, I will go into it.

The Court: Well, I think I have the view there that, while I agree with Mr. McKevitt that it is a

question for the Court to decide as a matter of law——

Mr. Etter: That's correct.

The Court: ——whether the doctrine shall be submitted, the Court doesn't assume the functions of the trier of the facts and try factual issues in order to determine whether it shall be submitted or not, and, if there is evidence which the jury could believe on both theories, I think both should be submitted, because a jury might believe one or the other, I can't tell.

Mr. Etter: That's correct.

The Court: I don't know what they will adopt factually.

Mr. Etter: Your Honor has no question, then?

The Court: Yes, I think it should be given.

Mr. McKevitt: Just one other observation I wanted [598] to make with reference to Mr. Etter's contention as to view.

Now, the only testimony that we have here about how far you can see down that track is the testimony of the the engineer and the fireman. The engineer says that when he was six or seven hundred feet or more, he saw this truck 25 feet from the crossing. Well, if he could see the truck that distance from the crossing, certainly the driver ought to be able to see the train. If one can't see the other, the other can't see it.

Mr. Etter: Oh, no, that doesn't follow. A man sitting up 15 feet looking down and somebody sitting in a panel truck trying to look up through the brush.

Mr. McKevitt: With a Diesel cab fourteen and a half feet above the top of the rails and the rails above the level of the road?

Mr. Etter: Yes, and the passenger is in a seat of a car two feet above the ground.

The Court: Well, I think that we have had this matter thoroughly discussed and——

Mr. McKevitt: That is the jury argument we are talking about.

The Court: It is always a difficult problem for a trial judge to determine what issues to submit to the jury, because no judge wishes to deprive a litigant of his right to trial by jury on any issue that is made by the facts, [599] and, yet, it is the responsibility of the court to see that issues are not submitted that are not substantially supported factually. Did you have something further?

Mr. McKevitt: Except for the purpose of the record, I don't know what your Honor's ruling is on my separate motions with reference to the subdivisions.

The Court: Oh, yes. Well, I am just announcing it.

Mr. McKevitt: I see, pardon me.

The Court: My introduction must have been a little remote.

What is it, Mr. Connelly?

Mr. Connelly: Your Honor indicated that he didn't lay much credence to Paragraph VII of the complaint with reference to wanton negligence, and to shorten this up because of the——

The Court: Wanton misconduct.

Mr. Connelly: Wanton misconduct. Excluding Subdivision (a), I would like to speak briefly on Subdivision (b) thereof.

The Court: All right.

Mr. Connelly: Which refers to the failure to blow the whistle at the approach to the intersection.

“A wanton act” has been set out in the instruction as one which is performed intentionally with a reckless indifference to injurious consequences probable to [600] result therefrom. It must be under such surrounding circumstances and existing conditions that the party doing the act or failing to act must be conscious, from his knowledge of such surrounding circumstances and existing conditions, that his conduct will in all common probability result in injury.”

Now, what I wish to point out to the Court was this:

In the condition of the evidence as it stands now, Scobee, the engineer, testified that he first saw the girl and applied his service application of the brakes and at that time the girl in the car was some 25 feet south of the O'Neill Crossing. Now, that is borne out by the speed tape which was introduced into evidence and which was described by Mr. Gaynor, and Mr. Gaynor said the speed tape indicates a service application of the brakes and a letting up of the service application of the brakes one-half mile back from the point of impact or, in other words, a distance back of at least 2,600 feet. In other words, taking the engineer's testimony that

he saw the girl 25 feet back, he made a service application, he saw the car start to stop, he took off the service application and let the train regain speed; couple that with Gaynor's testimony that this all happened 2,600 feet back, in other words, 1,300 feet back of the whistle stop, that, together with the O'Neill [601] testimony that there wasn't any whistle until the train started emerging from the underpass, would indicate that this man plainly and clearly saw the girl 1,300 feet prior to the whistle post, but didn't blow the whistle until he was within some 600 feet of her.

This statute that requires the blowing of the whistle 80 rods back is, of course, a misdemeanor and is punishable as such, and I think the jury, considering those facts, as they, of course, have a right to do, could easily find a wanton act on the part of the engineer, who, traveling in a train some 60 to 64 miles an hour, seeing a car approaching a crossing in excess of 2,600 feet back, approaching the whistle stop 1,300 feet back, and doesn't blow the whistle at all there, brings us, at least for argumentative purposes and so far as the complaint goes, within the meaning and definition of a wanton act with reference to Subdivision (b).

Mr. McKevitt: If the Court please, if that argument is true, we would have that train go 100 miles an hour to meet that automobile on the crossing.

Mr. Connelly: You are assuming the automobile was on the track for a given length of time, which, of course, is another question for the jury.

The Court: All right, go ahead, Mr. Connelly.

Mr. Connelly: Furthermore, with reference to Subdivision (c) [602] thereof, if we follow the same line of reasoning and we apply the same set of facts, and quoting the language here, that the engineer,

“***with reckless indifference to injurious consequences probable to result therefrom, failed to reduce the speed of said passenger train by applying full and sufficient braking power***”

There, again, I submit we have the same argument that is applicable to Subdivision (b) with reference to the whistle. I think when you are dealing with a punitive statute, when you have the engineer admitting that he saw the girl in excess of 2,600 feet, that there is testimony that he didn't blow the whistle at the whistle post, surely the jury has a right at least to the instruction on the wanton act.

That is all I have on that, your Honor.

The Court: Well, as I started to remark, it is a difficult thing to decide just what issues to submit to a jury in a case of this kind which is close on the evidence, and, as I say, I think perhaps courts sometimes are a little inclined to lean over backwards to be sure that the parties have a jury trial on every issue on which a reasonable inference might be drawn.

And it is perfectly natural for counsel to sell themselves on their own cases; that is what a good advocate [603] should do. He may over-sell himself and there is no danger in that, but there is danger

if he over-sells the court, particularly so on the part of plaintiffs.

I have had the rather unpleasant experience within the last month of having two big plaintiffs' verdicts set aside and reversed in the Court of Appeals, and that is a heart-breaking experience for a plaintiff.

And here, just from my experience as a judge and my evaluation of Washington law—and, of course, in this case, as Justice Frankfurter says, in a diversity case, a Federal judge is simply, in effect, another judge of the state; he has to apply the state law, and he has no power to make state law, but he has the duty of correctly interpreting it and applying it—and, of course, I could be wrong and frequently am, but in my judgment, anyway, if the plaintiff got a verdict in this case which under my instructions could be based on the failure of the defendant railroad company to maintain a watchman at this country road crossing, I don't think it would be worth a nickel, or, perhaps, being more practical, I should say it would be worth no more than what the railroad company thinks it would cost them to appeal.

And so that I do have a responsibility here of protecting the plaintiff, as well as the defendant, in the matter of submitting issues to the jury. And with that [604] thought in mind, I don't believe here there is any evidence of excessive speed, there is no statutory speed limit at a railroad crossing, and where a highway crosses a railroad grade, the railroad company has the right of way. It is the

duty of people who approach to stop, look and listen. It is their duty to see and to give the right of way to the train. And this applies to this matter of wanton misconduct, also, that the engineer driving his train down that track has the duty of maintaining a schedule. The railroad company doesn't have to stop and slow at each crossing. If they did, their traffic would be greatly impaired, against public interest, so that the engineer has the duty of maintaining his schedule and he has instructions to maintain his speed, unless something develops that warrants his slowing down, so that he has the right to assume when he approaches a crossing and he sees the vehicle approaching it, he has the right to assume, until the contrary clearly appears to him, that the vehicle will stop and give him the right of way.

So that even though he might see the vehicle back at 1,300 or some other feet, he has the right to assume that that vehicle will stop, as the law requires it to do, and give him the right of way, and it is only when the contrary appears that he is thrown into that emergency, that a duty arises on him to act. And it would certainly be a [605] peculiar application of the doctrine of wanton misconduct to say that when, at the last minute, he sees that somebody, contrary to what he has a right to expect, has gotten in trouble on that track and has got stopped there, that then he would be guilty of reckless disregard of consequences and wanton misconduct even if he did fail to act in a reasonable and prudent manner in that situation. He

might be guilty of negligence, but certainly, I think, he would not be guilty of wanton misconduct.

Now, I think I have indicated my view here pretty much. I don't think that this crossing has been shown to be a peculiarly dangerous crossing, country crossing, as the Supreme Court of this state has defined that, that prudent persons must use extraordinary precautions in approaching it. There has been a good deal of testimony here as to how difficult it was to see a train coming down that track, but most of that, I think, in the light of these photographs, was the angle of approach, which meant that if the driver didn't turn his head around, he couldn't see the train. There isn't any evidence here, and I think this 30 and 31 almost demonstrate that a person approaching that crossing could see the top of a Diesel engine, 14 and a fraction feet above the rails. What we are concerned with here is not that someone approaching this crossing could see the rails and both the rails all the way down the track, but that they [606] could see the train was coming, and they can see a train is coming if they can see the top of it, which is 14 feet high.

And the failure to maintain the brush here, I don't think there is any evidence sufficient to submit that to the jury, because we don't know where the railroad company's right of way was, and it isn't shown here that the brush really obstructed the view of the train or a Diesel 14 feet high.

Now, without taking the time to go into much detail here, I propose to submit to the jury—and,

of course, your objections will stand to this, Mr. McKevitt; I think you have made a clear record of that; and, of course the objection of counsel for the plaintiff to my not submitting is clear, I think—I propose to submit Subdivision (d) of Paragraph VI—

Mr. McKevitt: (b)?

The Court: (d)—a, b, c, d—which is failure to sound the whistle as required by statute.

Mr. McKevitt: I see.

The Court: And Paragraph (e), which is the last clear chance, and Paragraph (g), which is negligently failing to maintain proper and safe level of the rock and cinder ballast, and so on. I think that I had a great deal of difficulty with that ground of negligence, but I think [607] that the jury could draw a reasonable inference, not only from the plaintiff's testimony, but also the testimony of the engineer, that the car "bucked" up onto the planking, and I think the reasonable inference might be drawn that it was thrown into a buck by the peculiar situation there where the planking is five inches or so above the gravel and there was a sharp jump-off. Anyway, I have come to the conclusion that a reasonable inference might be drawn there.

Other than those three grounds of negligence, the motions of the defendant will be granted. And I have also come to the conclusion that while, of course, the question of contributory negligence of the deceased should be submitted to the jury, that the question of contributory negligence of the par-

ents should not be; that that issue will be withdrawn from the jury.

Now, although it is late here, rather than take the time at 1:30 after the jury comes in here, I think I will inform counsel as to what my position will be with reference to their requested instructions. What my position will be has been indicated as to a good many of them by the rulings on the motions, I think.

(Whereupon, the Court advised counsel as to the instructions to be given to the jury.)

The Court: Court will recess until 2 o'clock.

Jury Instructions

The Court: Now, gentlemen of the jury, it is time for me to instruct you as to the rules of law that you are to follow here in your deliberations in this case.

I wish it were possible for me to just in a few words in a conversational way, as I am now, tell you how you are to decide this case, what the rules of law are, but unfortunately it is not that simple. We have some rather complex situations develop. The relative rights of users of the highway and railroads where highways cross the railroad tracks is not a simple matter, some of the rules are rather technical, like this "last clear chance" doctrine that you have heard about, and it is my duty to instruct you fully and as accurately as I can on what these rules of law are and to try to assist you in applying them to the facts and to the case as they come to

you from the witnesses and the documentary evidence.

I think it might be helpful to you at the outset, however, if you bear in mind that, as I told you at the beginning of this case, it is the sole duty and responsibility of the jury to find the facts; it is the sole duty and responsibility of the Court to tell you the law, to announce to you the law that is to apply to these facts.

Now, where there is a conflict, as there usually is, [609] in the facts in a case of this kind, where each side has its own theory as to what the facts are and as to how the particular accident happened, then I must instruct you on both theories, because I have no right to assume which one you will adopt. So that these instructions that might, offhand, seem to you to be contradictory and confusing, I think are not really so if you regard them analytically and remember that I am trying to tell you, if you find the facts as contended by the plaintiff, you should do so and so; if you find the facts as contended by the defendant, you should do so and so; so that I try to meet both situations in the instructions as to the law that I shall give you.

Now, at the outset, let me say I am going to define these terms for you and go into much detail later on in my formal instructions, many of which I have written out for the sake of completeness and accuracy, but what we have got basically here is that a girl was killed at a railroad crossing. The father, bringing the suit for damages for the loss of his daughter, contends it was due to the negli-

gence or, to use lay language, the fault or blame of the railroad company, acting through its employees, mainly the locomotive engineer, that caused the accident and caused the death of the girl.

The defendant railroad company denies that they [610] were to blame in any respect or negligent, and they say, even if we were, the girl was to blame, she was guilty of contributory negligence, negligence on her part, which bars a recovery at law.

The plaintiff says no, the girl wasn't guilty of contributory negligence, but even if you should assume that she was, we have this "last clear chance" doctrine where if she placed herself, through her own blame, in a position of peril and the engineer on the train saw that or should have seen it in time to avoid the collision or to avoid her death, causing her death, by the application of proper methods, then, nevertheless, the railroad company is liable.

Now, the only contentions here of negligence which you need to regard—I am not going to send the pleadings to you because they are long and contain many things that are not denied—and I will simply say that so far as the plaintiff is concerned here, the contentions that the plaintiff makes that you should consider are that this collision on the railroad track and the death of Erna Mae Everett, the girl involved, and the ensuing damage to the plaintiff, was directly and proximately caused by the negligence of the defendant in the following particulars:

That the defendant neglected and failed to sound the crossing signals required by the statutes of the

State of Washington as the locomotive approached the said crossing, [611] by either blowing a whistle or sounding a bell on the locomotive;

The defendant negligently failed to stop the train, slacken its speed, or give timely or adequate warning of its approach to the crossing, when the persons operating the train saw, or by the exercise of ordinary care should have seen, Erna Mae Everett and plaintiff's panel truck in a position of imminent peril of being struck by the train;

And that the defendant negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing and immediately next to the wooden planking at the crossing.

Now, the burden of proof is on the plaintiff to prove these claims or contentions I have just read to you by a fair preponderance of the evidence, because they are denied by the defendant, and the defendant in its answer sets up what we call an affirmative defense and that affirmative defense is that the death of said Erna Mae Everett was caused and brought about solely and alone through her own negligence, which negligence was a direct and proximate cause of the collision which resulted in her death, and the burden of proving that contention by a fair preponderance is upon the defendant, because that contention, that claim, is denied by the plaintiff in his reply. [612]

Now, as I have stated or indicated here, basically this action is one for negligence, and negligence is the failure to exercise reasonable and ordinary

care. By the term "reasonable and ordinary care" is meant that degree of care which an ordinarily careful and prudent person would exercise under the same or similar circumstances and conditions. Negligence may consist of the doing of some act which a reasonably prudent person would not do or in the failure to do something which a reasonably prudent person would have done under the same or similar circumstances and conditions. Negligence is the want of due care or ordinary care in the particular situation. "Due care" and "negligence" are relative and what in one situation might be due care might be negligence in another, and the measure of duty is always reasonable care and caution under the particular circumstances presented.

Now, even though you find the defendant guilty of negligence that proximately caused Erna Mae Everett's death, then, nevertheless, plaintiff would not be entitled to recover damages for the deceased girl's death if the girl herself was guilty of negligence which proximately contributed to cause her death. That is what we call "contributory negligence," and I am not taking into consideration now this doctrine of last clear chance which I will explain to you in detail later on. [613]

Contributory negligence is negligence upon the part of the person for whose death a claim is asserted which proximately contributed to such death, and the term "negligence" in this connection has the same meaning as I have previously defined for you.

The term “proximate cause” of an injury or death, as used in these instructions, is that cause which, in a natural and continuous sequence, unbroken by any independent cause, produces the injury and without which the injury would not have occurred and would not have been sustained.

“Preponderance of the evidence” is the greater weight or convincing power of the evidence. On any issue, the side on which the evidence appears to you to have substantially greater convincing weight or power than the other side has established a preponderance of the evidence within the meaning of that term.

The mere fact that an accident happened in this case raises no presumption or inference of negligence on the part of the defendant. Neither negligence nor contributory negligence is ever presumed, but must be established, like any other fact, by a preponderance of the evidence as I have defined that term to you.

In arriving at a verdict, you will not allow yourselves to be influenced or controlled by any consideration [614] or feeling of passion, prejudice, or sympathy for or against either party to the action, nor will you be influenced or controlled in any way by the fact that the defendant is a corporation. It is your duty, and you are required under the law, to decide the case the same as if the parties to the litigation were natural persons, for all persons to an action are equal before the law and entitled to equal justice.

You are instructed that it is the law of the State

of Washington that every engineer driving a locomotive on any railway who fails to ring the bell or sound the whistle upon such locomotive or cause the same to be rung or sounded at least 80 rods from any place where such railway crosses a traveled road or street on the same level, except in cities, or to continue ringing of such bell or sounding of such whistle until such locomotive has crossed such road or street, shall be guilty of a misdemeanor. Therefore, if you find from the evidence in this case that the engineer of defendant's railroad train, F. W. Scobee, failed to ring the bell or sound the whistle upon defendant's locomotive at least 80 rods east of the O'Neill crossing, and failed to continue the ringing of such bell or the sounding of such whistle until the locomotive had crossed O'Neill Road, such failure would be negligence on the part of the defendant herein, and if such [615] negligence proximately caused the death of Erna Mae Everett, it would entitle the plaintiff to a verdict in his favor, in the absence of contributory negligence on the part of Erna Mae Everett. You will be instructed on the various aspects of contributory negligence later on, and I have given you some instructions heretofore in these instructions.

Now, there is involved in this case what is known as the doctrine of last clear chance. It is permissible to use the doctrine only after you find, and you may not use it unless and until you first find, that in the events leading up to the accident in question, both the deceased and the defendant were negligent.

The doctrine of last clear chance is divided into two phases to cover two separate possibilities: (1) that where the defendant actually saw the peril of the traveler on the highway and should have appreciated the danger and failed to exercise reasonable care to avoid injury, such failure made the defendant liable, although the traveler's negligence may have continued up to the instant of the injury; and (2) that where the defendant did not actually see the peril of the traveler, but by keeping a reasonably careful lookout, commensurate with the dangerous character of the agency and the locality, should have seen the peril and appreciated it in time, by the exercise of reasonable care, [616] to have avoided the injury, and failure to escape the injury results from failure to keep that lookout and exercise that care, the defendant was liable only when the traveler's negligence had terminated or eliminated or culminated in a situation of peril from which the traveler could not, by the exercise of reasonable care, extricate himself.

Therefore, if either of the two conditions just mentioned are found by you to have existed with respect to the collision in question, then you must find against the defense of contributory negligence, because under such conditions the law holds the defendant liable for any injuries suffered by the plaintiff, that is, on account of the death of Erna Mae Everett in this case, and proximately resulting from the accident, despite the negligence of the deceased.

I further instruct you, however, that the doctrine

of last clear chance contemplates a last clear chance, and not a last possible chance. It implies thought, appreciation, mental direction, and the lapse of sufficient time to act effectively upon the impulse to save another from injury. There must be an appreciable interval of time intervening between a collision and the moment when the engineer of a train has knowledge or notice of the danger in which the other party has been placed.

Now, under the laws of this state, the railway company has the right of way over a motorist at a crossing such as here involved, that is to say, a crossing at grade, and the driver of a motor vehicle is legally required to accord such right of way to an approaching train when both automobile and train are approaching the crossing simultaneously.

Under the law of the State of Washington, any person operating an automobile shall, upon approaching the intersection of any public highway with a railroad crossing, reduce the speed of such automobile to a rate of speed not to exceed that at which, considering the view along the railway track in both directions, such automobile can be brought to a complete stop within ten feet from the nearest track in the event of an approaching train.

If you find from the evidence in this case that Erna Mae Everett, the operator of the vehicle, violated the above provision of the law of the State of Washington, and if you further find that such violation was the direct and proximate cause of

her death, then your verdict should be for the defendant, unless, of course, you find for the plaintiff under the last clear chance doctrine which I have defined for you.

Now, if you find from the evidence that the train and automobile were simultaneously approaching the crossing in question, then the operators of the locomotive and [618] train had a right to assume, until the contrary became evident, that Erna Mae Everett would give the train the right of way, and the engineer was not required to attempt to slow or bring to a stop his train because the automobile may have been approaching the track.

It is the law of the State of Washington that a railroad crossing is a proclamation of danger in and of itself, and that those who propose to enter or do enter its zone must govern themselves accordingly. It is the positive duty of the traveler approaching a railroad crossing to look and listen, and this observation must be made from a position where looking and listening would be effective.

If you find from the evidence that the decedent, Erna Mae Everett, did not look or listen from a point where such would be effective, she was guilty of negligence as a matter of law, and if you further find that such negligence was the proximate cause of the accident, then your verdict must be for the defendant, disregarding again, of course, the last clear chance doctrine which I have heretofore defined to you.

If, under the physical facts in and about the crossing, the deceased Erna Mae Everett saw or

should have seen the approach of the defendant's train before her car entered on and stopped on the crossing, it was her duty to watch the advancing train. I further instruct you that [619] such duty is not performed by going forward blindly. It was the duty of the deceased, in the operation of her automobile, to look before she entered the danger zone. If, under the evidence, you find she knew, or in the exercise of reasonable care should have known, that she was entering such a danger zone and that the defendant's train was likewise approaching the danger zone, she had no right to rely on the presumption that the servants of the defendant railway company would attempt to stop or slow the speed of their locomotive and train in order to avoid an imminent collision.

Now, gentlemen, you are the exclusive judges of what is the evidence in this case and of the weight and credit to be given to the testimony of each witness. In doing this, you may take into consideration the conduct, appearance, and demeanor of each witness: the apparent candor and frankness or want of those qualities: the reasonableness or unreasonableness of the story told by the witness, its probability or improbability measured by your own experience in life; the interest or lack of interest on the part of the witness in the outcome of the case; and, in short, all the facts and circumstances disclosed from the witness stand; and in the light of all the circumstances, you are to give the testimony of each witness that fair and reasonable weight which in your particular judgment as [620] per-

sons of common sense it appears to you to be reasonably and justly entitled to receive.

A witness may be discredited or impeached by contradictory evidence or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony. If the jurors believe that any witness has thus been impeached or discredited, it is their exclusive province to give the testimony of that witness such credibility, if any, as they think it may deserve.

Now, inconsistencies or discrepancies in the testimony of a witness or between the testimony of a witness in the trial and a statement made before the trial or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. You should bear in mind that two or more persons witnessing an incident or transaction may see it differently, and innocent misrecollection, like failure to recollect, is not an uncommon experience.

In weighing the effect of any discrepancy, the jury should consider whether it pertains to a matter of importance or an important detail and whether the discrepancy results from innocent error or willful falsehood. You should be slow to conclude that any witness has wilfully testified falsely to any material matter, but if you do so conclude, you are at liberty to discredit the entire testimony of such witness, except in so far as it may be corroborated by other credible evidence.

Now, I have no means of telling, of course, what your verdict will be, but it is my duty to give you

an instruction on the measure of damages in case you should find for the plaintiff. My giving you this is not any indication or hint on my part as to what I think you should do. I am simply giving you this instruction as to the measure of damages in case you should reach the point where you need or require it.

You are instructed that should you decide from the evidence that the plaintiff is entitled to damages for the loss of his minor child, you will give consideration to the following as a measure of damages to be awarded:

You shall determine the value of the services of this child from the date of her death until she would have attained the age of majority, less the cost of her support and maintenance to her parents during this interval. In determining the value of the deceased child's services, you must take into consideration the child's health, her mental and physical capacity, both present and prospective, as well as the situation of her parents. In determining the value of the deceased child's services, you should not consider any distress, sorrow, or mental suffering of the parents caused by the death of the child. You may also [622] consider what expenses may have been incurred as shown by the evidence by the plaintiff for funeral expenses as the result of the death of the child.

Now, in arriving at your verdict, you are not permitted, if your verdict is for the plaintiff, to add together different amounts representing the respective views of different jurors and to divide the total

by twelve or by some other figure intended to represent the number of jurors involved. Any such figure would result in a quotient verdict and would be contrary to law and would be in violation of your oaths. You are, of course, to give consideration to each others' views and reasoning and honestly endeavor to reach a verdict, but such common agreement is to be based upon the final honest belief of the jurors and must not be arrived at by any mechanical process of addition and division, which constitutes what we call a quotient verdict.

Now, when you retire to the jury room to consider your verdict, you will elect one of your members as foreman. It will be his duty to preside over your deliberations on your verdict and to represent you as spokesman in the further conduct of the case in court. And you will take with you to the jury room all of these exhibits which have been admitted in evidence and forms of verdicts which have been prepared for your convenience. [623]

The forms of verdict are very simple and will, I am sure, give you no trouble. They have the caption of the case and then one of them, "We, the jury in the above-entitled case, find for the defendant;" the other, "We, the jury in the above-entitled case, find for the plaintiff in the sum of \$....." You select the verdict, the form of verdict, that is in accord with your conclusion. And it will be necessary for all of you to agree to return a verdict; in other words, the verdict must be unanimous; and when you have all agreed upon a verdict, then the foreman will sign it and you should notify the bail-

iff that you are ready to return your verdict in court. I will excuse the jury——

Mr. Etter: Your Honor.

The Court: Yes?

Mr. Etter: You prefaced your instructions by stating that in the pleadings that one of the allegations of negligence was the failure to maintain the crossing in better condition, but you did not instruct on it.

The Court: I will ask the jury to step out just a moment, please.

(The following proceedings were had in the absence of the jury:)

The Court: What you have reference to, I suppose, [624] is Subparagraph (g) in Paragraph VI of the complaint, isn't it?

Mr. Etter: Yes, your Honor. In other words, I felt——

The Court: I don't believe any request was submitted on that, was it?

Mr. Etter: Yes, there was a request submitted on it, but it was under the wanton misconduct and your Honor indicated he wasn't going to give that instruction, but your Honor did indicate that he was going to give an instruction that covered (g), so we didn't prepare one, although I can certainly do it in about two seconds, but I thought your Honor was going to instruct on that.

Mr. McKevitt: Did you request that, Max?

Mr. Etter: Yes, we requested it under the wanton misconduct, yes.

Mr. McKevitt: You didn't request it on a specific instruction on defective planking.

The Court: The reason I overlooked it was it wasn't submitted as a request based on negligence.

Mr. Etter: That's right.

The Court: The only one you submitted was based on wanton misconduct.

Mr. Etter: We didn't get one out because I thought your Honor indicated he was going to instruct on that. [625]

The Court: Have the jury come back in.

(The following proceedings were had in the presence of the jury:)

The Court: Gentlemen of the jury, I overlooked one claim of negligence here of the plaintiff, and on that point I instruct you that if you find from the preponderance of the evidence that the defendant railway company negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing and immediately next to the wooden planking at the crossing, and you find that that negligence was the proximate cause of the death of Erna Mae Everett, and you further find it appears that there was no contributory negligence on the part of Erna Mae Everett, then your verdict should be on that point for the plaintiff.

I want to say this, in this connection, that because this particular matter was overlooked in the instructions and given separately, don't overemphasize or give it any special importance. It is just the fact I inadvertently overlooked it.

Now I will have the jury retire for further proceedings.

(The following proceedings were had in the absence of the jury:) [626]

The Court: In the absence of the jury, counsel may now take exception to the Court's instructions or failure to give proposed instructions.

Mr. Etter: Plaintiff has no exceptions to the instructions.

Mr. McKevitt: May it please the Court, the jury not yet having retired to consider of their verdict, the defendant now takes the following exceptions to instructions given by the Court:

The defendant excepts to the giving of the instruction on the last clear chance doctrine for the following reasons:

Under the evidence in this case, or more particularly by virtue of the lack of evidence in this case, there was no issue to submit to the jury with reference to the application of this doctrine.

The defendant further excepts to the instruction given, in that since under the law of the State of Washington the question of whether or not the last clear chance doctrine applies is one to be determined, in the first instance, by the Court, that if the Court felt that one or the other branches of the doctrine should be submitted, then under the decisions of the Supreme Court of the State of Washington, the Court should have eliminated one of the two branches of the doctrine and submitted but one of the [627] branches.

The defendant excepts to the instruction of the

Court touching the allegation of negligence concerning the defect in the crossing itself and the roadway leading thereto for the reason and upon the ground that there is no evidence in this case to justify the submission of that issue to the jury, because, even assuming that there was some defect in the planking of the crossing, there is no evidence in the case that this defect, if it existed, was the cause of this truck stalling on the crossing.

Further objection is made to that instruction because the language of it includes the duty of the railway company to maintain the roadway leading up to the crossing, which might leave the jury under the impression that the defendant was under the duty to maintain that roadway and not a particular portion of it. In other words, what I have in mind there, your Honor, was that it should be limited to the immediate approach of the roadway to the crossing.

The defendant excepts to the refusal of the Court to give its instruction—I have got mine numbered 8 here, I don't know whether it is No. 8 or not, but at any rate it is the instruction that was requested in connection with the fact that the young girl did not have a driver's license.

The Court: Yes. [628]

Mr. McKeivitt: The position of the defendant is this, that under the laws of the State of Washington, it was negligence per se on the part of the father to have permitted this girl to drive a car without an operator's license issued by the State of Washington, and the evidence would have been, had

the defendant been permitted to prove it by the cross-examination of the plaintiff, that the girl did not have a license, as indicated in the defendant's offer of proof, the objection to which was sustained.

The Court: I don't think you numbered your proposals, but I have in mind what you mean but I wonder if the record sufficiently shows it. You made a proposal on that, didn't you?

Mr. McKevitt: Yes.

The Clerk: Your Honor, I numbered counsel's original requests.

The Court: Numbered their originals, and you better refer to the number there, then.

The Clerk: With reference to the operator's license is Defendant's No. 8.

Mr. McKevitt: No. 8. Well, thank you.

The Court: No. 8.

Mr. McKevitt: The defendant excepts to the failure of the Court to include in the instruction on last clear chance that was given the language in Defendant's Requested [629] Instruction No. 10, that the doctrine of last clear chance does not mean a splitting of seconds when emergencies arise.

That was all, your Honor.

The Court: I might say on this instruction which I gave off the cuff here, having overlooked it, on the failure to maintain the roadway, I had assumed that I gave the statement in the same language as your allegation here, and I read that to mean that you are claiming that the defendant railroad company was negligent in failing to maintain a proper safe level of rock and cinder ballast on the road-

way leading up to and immediately adjacent to the wooden planking. Your language is "on the roadway leading up to said crossing and immediately next to the wooden planking," which means it is on the roadway and that part of it immediately next to the wooden planking.

Mr. Etter: That is all we mean by it. I don't think that they have to maintain that highway out there.

The Court: I don't think the jury could be misled. That is the only evidence there was was that hole.

Mr. Etter: That is correct.

The Court: All right, bring in the jury. The record will show your exceptions.

(Whereupon, the following proceedings were had in the presence of the jury:) [630]

The Court: All right, you may be seated, gentlemen. I will have the bailiffs sworn now.

(Whereupon, the bailiff were sworn to take the jury in charge.)

The Court: The jury will retire now to consider its verdict.

(Whereupon, the jury retired at 4:55 p.m. to consider its verdict.)

The Court: I suggest that counsel leave their telephone numbers here so you can be called to get down within a reasonable time when the jury is ready with the verdict.

Court will recess subject to call.

(Whereupon, the trial in the instant case was recessed subject to call.) [631]

RULING ON MOTION

Be it remembered that the above-entitled cause came on for hearing before the Honorable Sam M. Driver, Judge of the said Court, at Spokane, Washington, on March 3, 1955, on defendant's motion to set aside verdict and judgment entered thereon or, in the alternative, for a new trial; counsel being present as during the trial of said cause.

(After hearing argument by counsel for the respective parties, the Court made the following oral ruling on the motion:)

The Court: Well, the hour is getting late here, it is time for all of us to go to lunch. These railroad [632] crossing cases have always been difficult for me and I suppose they always will be. There are laws that give, without question, rules of law that give the railroad company the right of way and make the presence of the track and the train in themselves warnings of danger, and it is the duty of people to stop, look and listen. And then, on the other hand, we have what, as practical people, we know is the tendency of juries to find for the plaintiff in these cases where there is a corporate railroad defendant. So that we get these borderline cases that result in verdicts for the plaintiff.

But I think here that there is sufficient evidence to warrant or to sustain the verdict in this case, and I will deny the motions on that basis.

I think that, also, it seems to me, that as a matter of common sense that there must be situations, and I think there was here, where the jury could find either one or the other phase of the doctrine of last

clear chance can apply, depending upon how they view the credibility of the witnesses and depending upon what inferences they may draw, reasonable inferences, from the testimony, and if it is possible for them to draw either one or the other, depending upon what inferences they draw or what weight and credibility they give to conflicting testimony, then, it seems to me, that a judge has no alternative than to submit [633] both doctrines and let the jury make the choice.

The motions will be denied, then.

Court will recess until 1:30.

[Endorsed]: Filed April 14, 1955.

[Endorsed]: No. 14795. United States Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a corporation, Appellant, vs. Ernest Everett, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed: June 24, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14795

NORTHERN PACIFIC RAILWAY COMPANY,	
a corporation,	Appellant,
vs.	
ERNEST EVERETT,	Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT RELIES

In compliance with Rule 17, Subparagraph 6, of the above Court, appellant states that the following are the points on which it intends to rely on this appeal:

In support of this contention that the District Court should have granted its motion for a directed verdict made at the close of appellee's evidence and renewed at the close of all the evidence, appellant asserts:

1. The evidence conclusively showed as a matter of law that the death of appellee's decedent was caused and brought about solely and alone through her own negligence, which was the direct and proximate cause of her death.

2. The complaint charged the defendant railway company with eleven separate acts of negligence; at the close of all the evidence the Court withdrew eight of said charges from the jury's consideration and submitted to it for determination the following charges of negligence:

(a) Failure to give statutory crossing signals by whistle or bell;

(b) Defective condition of crossing;

(c) Last Clear Chance Doctrine.

3. There was no evidence to support subdivision (a) since the evidence disclosed that the decedent did have ample warning by whistle and bell signal of the train's approach; that the accident happened in broad daylight, with no impairment of view as the result of weather conditions; that the decedent was thoroughly familiar with the crossing in question and knew she was about to proceed over the main line of the railway company; that at a distance of at least 100 feet from the crossing and at all points up to the same she had an unobstructed view of the train's approach; that she negligently stalled the truck on the crossing in an attempt to beat the train across the crossing.

Negligence cannot be predicated on the alleged failure of the defendant's employes to give the statutory crossing signals at the crossing in question since such failure, if any, was not the proximate cause of the death of plaintiff's decedent. Had she looked and listened before reaching the crossing, as by law required, she would have had ample notice of the train's approach in sufficient time to have brought the truck to a stop short of the crossing. (Subdivision b—Defective Condition of Crossing) There is no evidence to support the submission of this issue to the jury since no testimony was introduced which would indicate, either directly or by reasonable inference, that the alleged defective con-

dition of the crossing was a proximate cause of the collision. The fireman and the engineer in charge of defendant's train were the only actual eye witnesses of the approach of the truck to the crossing. No inference can be derived from their testimony that the alleged defective condition had anything to do with the truck stalling on the crossing. The condition of the crossing was an incident to and not in any manner a proximate cause of the death of plaintiff's decedent. (Subdivision c—Last Clear Chance Doctrine) As previously observed, the only evidence as to the approach of this truck to the crossing came from the engineer and fireman. The collision occurred on the main line of the defendant. The train involved was a passenger train consisting of seven or eight coaches and a Diesel locomotive. It was traveling at a lawful rate of speed of not to exceed 65 miles per hour. The evidence conclusively established that when it first became apparent to the engineer and fireman that this truck was not going to yield the right of way to the defendant that the train was dinamited. Because of the distance involved and the speed of the train, expert testimony of the defendant in no wise controverted, but conclusively established that the train could not have been stopped short of the crossing nor its speed diminished so as to have enabled the decedent minor to have gotten into a place of safety; as a matter of fact, the evidence conclusively established that after the truck had stalled on the crossing the minor got out of the truck, took three or four steps, traveling a distance of 10 or 12 feet, before the train struck

the truck which in turn was hurled against the decedent. The position of appellant is that where equal opportunity is given to the driver of the truck and the train operatives to have avoided the collision the doctrine of last clear chance has no application.

4. The District Court should have ruled as a matter of law that plaintiff's decedent was guilty of negligence which was the direct and proximate cause of her death and accordingly should have granted appellant's motion for a directed verdict or motion for judgment notwithstanding the verdict.

5. That in any event the District Court committed errors of law, because of which the cause should be remanded for a new trial, in the following respects:

(a) The evidence showed that at the time of her death the minor child was 16 years of age. The Court erred in sustaining an objection to a question propounded to plaintiff on cross examination to the effect that at the time of her death the minor child was not licensed under the laws of the State of Washington to operate a motor vehicle.

(b) The Court erred in sustaining the objection of plaintiff's counsel to an offer of proof of this fact.

(c) The Court erred in refusing to give Defendant's Requested Instruction No. 8, or an instruction substantially similar thereto. The requested instruction reads as follows:

"Defendant's Requested Instruction No. 8.

"I instruct you that under the laws of the State of Washington in force at the time of this accident

it was unlawful for a person to cause or knowingly permit his child under the age of eighteen years to operate a motor vehicle upon a public highway as a vehicle operator unless such child has first obtained a vehicle operator's license. Said law further provides that no person shall authorize or knowingly permit a motor vehicle owned by him or under his control to be operated by any person who is not legally licensed as an operator. If you find from the evidence in this case that Erna Mae Everett at the time in question did not have a vehicle operator's license and that the plaintiff herein knew that she did not have such license, and if you find that said plaintiff authorized or knowingly permitted his daughter to operate the vehicle in question, then I instruct you that the plaintiff violated the law above referred to and was guilty of negligence. If you further find that such negligence was the direct and proximate cause of his daughter's death then your verdict should be for the defendant."

(d) The Court erred in refusing to give defendant's Requested Instruction No. 10, or an instruction substantially similar thereto. The requested instruction reads as follows:

"Defendant's Requested Instruction No. 10.

"Plaintiff has invoked in this case what is known in the Law as the last clear chance doctrine. I instruct you that you are not here concerned with a last possible chance on the part of the Railway Company to have avoided this collision. A clear chance to avoid a collision involves the element of sufficient time on the part of the engineer operating

defendant's train to have appreciated the peril of the driver of the truck and to take the necessary steps to have avoided injuring the driver thereof. In other words, last clear chance implies thought, appreciation and mental direction on the part of the engineer and the lapse of sufficient time to effectively act upon the impulse to have avoided the collision. The doctrine of last clear chance does not mean a splitting of seconds when injuries arise. The words mean exactly as they indicate, last clear chance, not possible chance.

"I therefore instruct that if you find from the evidence of this case that after the engineer was first able to discover the peril of the driver of the truck he was unable to bring his train to a complete stop or to have slackened its speed for a sufficient interval of time in order to permit the driver to escape, then your verdict should be for the defendant."

(e) The Court erred in giving the following instruction to the jury:

"Now, there is involved in this case what is known as the doctrine of last clear chance. It is permissible to use the doctrine only after you find, and you may not use it unless and until you first find, that in the events leading up to the accident in question, both the deceased and the defendant were negligent.

"The doctrine of last chance is divided into two phases to cover two separate possibilities: (1) that where the defendant actually saw the peril of the traveler on the highway and should have appreciated the danger and failed to exercise reasonable

care to avoid injury, such failure made the defendant liable, although the traveler's negligence may have continued up to the instant of the injury; and (2) that where the defendant did not actually see the peril of the traveler, but by keeping a reasonably careful lookout, commensurate with the dangerous character of the agency and the locality, should have seen the peril and appreciated it in time, by the exercise of reasonable care, to have avoided the injury, and failure to escape the injury results from failure to keep that lookout and exercise that care, the defendant was liable only when the traveler's negligence had terminated or eliminated or culminated in a situation of peril from which the traveler could not, by the exercise of reasonable care, extricate himself.

"Therefore, if either of the two conditions just mentioned are found by you to have existed with respect to the collision in question, then you must find against the defense of contributory negligence, because under such conditions the law holds the defendant liable for any injuries suffered by the plaintiff, that is, on account of the death of Erna May Everett in this case, and proximately resulting from the accident, despite the negligence of the deceased.

"I further instruct you, however, that the doctrine of last clear chance contemplates a last clear chance, and not a last possible chance. It implies thought, appreciation, mental direction, and the lapse of sufficient time to act effectively upon the impulse to save another from injury. There must

be an appreciable interval of time intervening between a collision and the moment when the engineer of a train has knowledge or notice of the danger in which the other party has been placed."

(f) The Court erred in instructing the jury with reference to the alleged defective condition of the crossing and the immediate approach thereto. In stating the issues involved the Court recited that one of them was

"That the defendant negligently failed to maintain at a proper and safe level the rock and cinder ballast on the roadway leading up to the crossing and immediately next to the wooden planking at the crossing."

(g) That the verdict was excessive and should either be reduced by this Court or a new trial directed.

Dated this 7th day of July, 1955.

McKEVITT, SNYDER & THOMAS,

/s/ By F. J. McKEVITT,

Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed July 9, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD

Pursuant to Rule 17, Subparagraph 6, of the Rules of the above Court, appellant designates the following portions of the record as material to the consideration of this appeal to be incorporated in the printed transcript:

1. Complaint.
2. Answer to Complaint.
3. Reply.
4. Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16 and 33.

5. Defendant's Exhibits 1, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35 and 36.

(Note: The exhibits above referred to were received in evidence and are deemed material to this appeal, but are not suitable for printing, and appellant assumes that all original exhibits will be considered by the Court.)

6. Reporter's entire record of the proceedings and testimony at the trial.

7. Defendant's Requested Instructions Nos. 8 and 10.

8. Verdict.

9. Judgment on the verdict.

10. Motion to Set Aside Verdict and Judgment entered thereon and for Judgment in accordance with defendant's prior motions for a directed verdict; and alternative Motion for a New Trial.

11. Order denying defendant's motion to set aside

verdict and judgment entered thereon and for judgment in accordance with defendant's prior motions for a directed verdict; and alternative motion for a new trial.

12. Notice of Appeal.

13. Bond on Appeal.

14. Designation of Contents of Record on Appeal directed to the District Court Clerk pursuant to Rule 75 of the Federal Rules of Civil Procedure; Supplemental Designation of Contents of Record on Appeal.

15. Order of District Judge extending time for docketing record with United States Court of Appeals for the Ninth Circuit.

16. Statement of Points on which Appellant Relies, filed with the Court of Appeals for the Ninth Circuit pursuant to its Rule 17, Subparagraph 6.

17. This designation.

Dated this 6th day of July, 1955.

McKEVITT, SNYDER & THOMAS,

/s/ By F. J. McKEVITT,

Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed July 9, 1955. Paul P. O'Brien, Clerk.

